1219

APR 3 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

Case No. 20033

BEALL PIPE AND TANK CORPORATION, a corporation,

Petitioner,

v.

SHELL OIL COMPANY, a corporation,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH E. ROBERTS,
1200 Standard Plaza,
Portland, Oregon 97204,
Attorney for Petitioner.

JOHN L. SCHWABE,
1200 Standard Plaza,
Portland, Oregon 97204,
Of Counsel.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-67

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting Writ	5
I. A. Important Federal Question	5
B. Conflict with City Service Oil Co. v. Dunlop	9
C. Conflict Among the Circuits	10
D. Conflict with Erie R.R. Co. v. Tompkins	10
II. Conflict with Erie R.R. Co. v. Tompkins	11
Conclusion	12
Appendix	
a. Jury Answers to Interrogatories and Judgment Order	13
b. Opinion of The United States District Court for the District of Oregon	17
c. Opinion of The United States Court of Appeals for the Ninth Circuit	59
d. Excerpts From Petitioner's Reply Brief	67

TABLE OF CASES

Page

Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 537, 78 S. Ct. 893, 900, 2 L. Ed. 2d 953 (1958) 10

City Service Oil Co. v. Dunlop, 308 U.S. 208, 60 S. Ct. 201, 203 (1939) 9, 12

Continental Can Co. v. Horton, 250 F.2d 637, 640, (8 Cir. 1957) 9

Davis Frozen Foods, Inc. v. Norfolk Southern R.R., 204 F.2d 839 (4 Cir. 1953), cert. denied, 346 U.S. 824, 74 S. Ct. 41, 98 L. Ed. 349 10

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938) 9, 10, 11, 12

Fish v. Southern Pacific Co., 173 Or. 294, 301, 143 P.2d 917, 920, 145 P.2d 991 (1944) 5, 6

Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945) 10

Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136 (1965) 10

Nichols v. Skelly Oil Co., 175 F.2d 113 (8 Cir. (1949) 9

Phipps v. N. V. Nederlansche, 259 F.2d 143, 145 (9 Cir. 1958) 10

Pogue v. Great Atlantic and Pacific Tea Co., 242 F.2d 575, 582 (5 Cir. 1957) 10

Trivette v. New York Life Insurance Co., 283 F.2d 441 (6 Cir. 1960) 10

Van Lom v. Schneiderman, 187 Or. 89, 95, 210 P.2d 461 (1949) 11

Wieloch v. Rogers Cartage Co., 290 F.2d 235, 237 (7 Cir. 1961) 10

STATUTES

	Page
Federal Rules of Civil Procedure, Rule 50, 28 U.S.C.A.	3, 10
ORS 17.610	3
ORS 18.140	3
Oregon Const. Am. Art. VII, § 3	3

In the Supreme Court
of the United States

OCTOBER TERM, 1966

Case No. 20033

BEALL PIPE AND TANK CORPORATION,
a corporation,

Petitioner,

v.

SHELL OIL COMPANY, a corporation,

Defendant.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the order of the United States District Court for the District of Oregon granting defendant's motion for a judgment notwithstanding the verdict and in the alternative granting defendant's motion for a new trial.

OPINIONS BELOW

The verdict of the jury and judgment in the United States District Court is printed in Appendix A hereto, infra page 13.

The memorandum of the United States District Court granting defendant's motion for a judgment notwithstanding the verdict and for a new trial in the alternative is printed in Appendix B, hereto, infra page 17.

The opinion of the Ninth Circuit Court of Appeals is printed in Appendix C hereto, infra page 59.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered and filed the 4th day of January, 1967.

The jurisdiction of this court is invoked under 28 USCA 1254(1).

QUESTIONS PRESENTED

1. Must a federal district court sitting in a diversity case apply the state standard with respect to granting or denying a motion for judgment notwithstanding the verdict based on the sufficiency of the evidence.

2. Must a federal district court sitting in a diversity case apply the state standard with respect to

granting or denying a motion for a new trial based on the sufficiency of the evidence.

STATUTES INVOLVED

Federal Rules of Civil Procedure, Rule 50, 28 U.S.C.A.
ORS 18.140.
ORS 17.610.
Oregon Const. Am. Art. VII, § 3.

STATEMENT OF THE CASE

This is an action based upon breach of warranty and negligence. Plaintiff manufactures steel pipe and dips it in an asphalt coating material to prevent corrosion. This finished product is used for conveyance of water in domestic water and irrigation systems.

For all practical purposes, plaintiffs production methods have not been changed in the last 30 years.

Prior to the purchase and use of defendant's asphalt coating material, plaintiff had for approximately thirty years used an asphalt coating material manufactured by the Witco Chemical Company. At the time of plaintiffs' decision to use defendant's product, defendant represented to the plaintiff that defendant's asphalt coating material was suitable for coating steel pipe and ultimate use for conveyance of water in domestic water and irrigation systems.

Several months after plaintiff commenced using defendant's coating material, plaintiff started receiving complaints from users that the asphalt coating was defective in that it came loose from the pipe.

Plaintiff notified defendant of the disbonding problem.

Asphalt coating material will disbond from steel pipe by reason of either faulty chemical composition or improper application. Plaintiff contended and offered proof that the disbonding failures resulted from an imbalance of the chemical composition of the asphalt coating material purchased from defendant which defendant denied. Defendant contended and offered proof that the disbonding failures resulted from improper application by plaintiff which plaintiff denied.

At the close of plaintiff's case, defendant moved for a directed verdict primarily upon the grounds that there was not sufficient evidence to support any of the contentions of plaintiff relative to either warranty or negligence. The trial court denied the motion. Then, after both parties had rested, defendant again moved the court for a directed verdict upon the same grounds as it was previously made. The court denied the motion.

The jury returned their verdict in favor of the plaintiff and in answer to special interrogatories submitted by the court specially found: that defendant had made certain warranties to plaintiff which were breached; that defendant was negligent in formulating and processing the asphalt coating material and that such negligence was the proximate cause of plaintiff's damages; that plaintiff was negligent but that such negligence was not a proximate cause of plaintiff's damage.

Thereafter defendant filed a motion for a judgment notwithstanding the verdict and in the alternative for a new trial upon the same grounds as set forth in its previous motions for a directed verdict. The trial judge granted defendant's motion for a judgment notwithstanding the verdict upon the sole ground of insufficiency of the evidence and in the alternative granted defendants' motion for a new trial upon the ground that the verdict was against the weight of the evidence.

Thereafter plaintiff appealed from the trial court's order. The appellate court affirmed the trial court.

REASONS FOR GRANTING THE WRIT

I

A. An Important Question of Federal Law Has Been Decided by the Court Below Which Has not Been but Should Be Settled by This Court

This court has not decided whether a federal court sitting in a diversity case must apply the state or some federal standard in granting or denying a motion for judgment notwithstanding the verdict when such motion is based solely upon the sufficiency of the evidence. The court below has implicitly, if not explicitly, held that a federal standard applies.

The Supreme Court of the state of Oregon has formulated strict standards for granting or denying such motions. In *Fish* v. *Southern Pacific Co.*, 173 Or. 294, 301, 143 P.2d 917, 920, 145 P.2d 991 (1944), the court stated:

In considering the propriety of these rulings the motions must be regarded as having admitted the truth of plaintiff's evidence and of every inference of fact that may be drawn from the evidence. The evidence itself must be interpreted in the light most favorable to plaintiff. *McCall* vs. *InterHarbor Navigation Co.*, 154 Or 252, 59 P2d 697. *Where the evidence conflicts, the court may not infringe upon the function of the jury by seeking to weigh or evaluate it, but is concerned only with the question of whether or not there was substantial evidence to carry the case to the jury and to support the verdict.*" (emphasis added)

The U. S. District Court for the District of Oregon and the U. S. Court of Appeals for the Ninth Circuit applied standards which vary substantially from those expressed by the Oregon Supreme Court in that the trial court's ultimate reason for setting aside the jury's verdict and granting defendant's motion for a judgment notwithstanding the verdict in the present case was:

"However, in this case the Court has confirmed its original belief that this verdict for plaintiff if allowed to stand, would be extremely unfair to defendant, would be a legally unjustified windfall to the plaintiff, and would be, in the opinion of the Court, a miscarriage of justice." (Appendix B, p. 57)

"* * * But the law contemplates that in these circumstances the Court has a responsibility to act in accordance with its considered evaluation of the record." (Appendix B, p. 58)

The U. S. Court of Appeals approved this standard in sustaining the trial court's order.

In assessing plaintiff's case in the framework of the standard quoted above, the trial court necessarily must have judged the credibility of witnesses and drawn inferences and evaluated them. This ruling is contrary to the standard established by the Supreme Court of Oregon. In fairness to the trial judge, it should be noted that he was a California judge without background in the Oregon law.

There are many glaring instances where the trial court resolved conflicts in the evidence, judged the credibility of the witnesses, and evaluated the evidence. Set forth below are five crucial examples:

A. The two experts called by plaintiff, Dr. Traxler and Dr. Marian, testified expressly that in their expert opinion the defendant's product was defective by reason of faulty chemical composition. The trial court concluded that these same experts found that the defendant's material was the best. The trial court could only so have concluded by evaluating the testimony, resolving conflicts and judging the credibility of the witnesses.[1]

B. Dr. Marian testified in great detail that he produced laboratory failures of the defendant's product. However, the trial court concluded that Dr. Marian was unable to produce any failures in 2½ years

---

[1] See Appendix "D," Pp. 67 to 76, for specific transcript references which demonstrate that the trial court did in fact resolve conflicts in the evidence; judge the credibility of witnesses; and evaluate the evidence in granting the motion.

of testing. The trial court could have so concluded only by making a severe credibility judgment of the testimonyof Dr. Marian.[2]

C. The defendant's witnesses testified that 20% of the Shell dipped pipe failed and approximately 9% of the Witco pipe failed. The trial court concluded that 20% of the Witco dipped pipe also failed. The court could have made such conclusion only by making a credibility judgment of the testimony.[2]

D. Plaintiff's lay witnesses and expert witnesses testified that defendant's material failed to adhere to culvert pipe the same as it failed to adhere to smooth steel pipe. However, the trial court concluded that defendant's material did adhere to culvert pipe. Therefore the trial court obviously had completely discounted all of the testimony of plaintiff's witnesses on this point.[2]

E. Plaintiff's witnesses testified that they had no knowledge of Witco dipped pipe failures when they were considering the purchase of defendant's product in September of 1959. The trial court concluded that plaintiff's personnel did have such knowledge. The trial court could only have arrived at such conclusion by picking and choosing between conflicting testimony.[2]

The issue presented here is of crucial importance in every diversity case litigated in the federal courts. This case aptly and concretely demonstrates the issue; and that it is ripe for determination.

---

[2] See Footnote 1, Supra, p. 7.

B. There Is a Conflict Between the Decision of the Court Below and the Case of City Service Oil Co. v. Dunlop, 308 U.S. 208, 60 S. Ct. 201, 203 (1939).

The application of a federal standard by the courts below in granting the motion for a judgment notwithstanding the verdict conflicts with *City Service Oil Co.* v. *Dunlop*, 308 U.S. 208, 60 S. Ct. 201, 203 (1939) wherein this Court held that a federal court, sitting in a diversity case, must apply the law of the state with respect to the burden of proof. There are no reasons for distinguishing between the burden of proof and a motion for a judgment notwithstanding the verdict based upon the sufficiency of the evidence. Forum shopping and other evils anticipated in the case of *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938) would come to fruition if the applicable law were determined to be federal rather than state.

C. There is a Conflict in the Circuits in Respect to the Necessity to Defer to State Law on The Issue of Granting or Denying a Motion for a Judgment Notwithstanding the Verdict Based on the Sufficiency of the Evidence.

There is a conflict in the circuits with respect to the necessity to defer to state law on the issue of entering a judgment notwithstanding the verdict on the grounds of insufficient evidence. The Sixth, Seventh and Eighth Circuits have held that the federal court must defer to state law in making this determination. *Continental Can Co.* v. *Horton*, 250 F.2d 637, 640, (8 Cir. 1957), *Nichols* v. *Skelly Oil Co.*, 175 F.2d 113,

(8 Cir. 1949), *Wieloch* v. *Rogers Cartage Co.*, 290 F.2d 235, 237 (7 Cir. 1961) and *Trivette* v. *New York Life Insurance Co.*, 283 F.2d 441 (6 Cir. 1960). The Fourth, Fifth and Ninth Circuits have ruled to the contrary. *Pogue* v. *Great Atlantic and Pacific Tea Co.*, 242 F.2d 575, 582 (5 Cir. 1957), *Davis Frozen Foods, Inc.* v. *Norfolk Southern RR*, 204 F.2d 839 (4 Cir. 1953), cert. denied, 346 U.S. 824, 74 S. Ct. 41, 98 L. Ed. 349; *Phipps* v. *N. V. Nederlandsche Amerikaansche S., M.*, 259 F.2d 143, 145 (9 Cir. 1958), and the case at bar. This conflict is a real one and only this Court has the power to resolve it.

D. There is Ambiguity and Uncertainty with Respect to the Continuing Validity and Ambit of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L Ed. 1188 (1938)

The decisions in the cases of *Hanna* v. *Plumer*, 380 U.S. 460, 85 S. Ct. 1136 (1965) and *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 537, 78 S. Ct. 893, 900, 2 L. Ed. 2d 953 (1958) create a conflict and ambiguity with respect to the continuing validity and the intended ambit of *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945).

Rule 50 of the Federal Rules of Civil Procedure spells out the mode and manner by which one moves for a judgment notwithstanding the verdict. The precise standard for granting or denying these motions is not spelled out. If there is to be federal preemption by reason of the fact that the mode and manner

have been spelled out in the Federal Rules of Civil Procedure, then such a determination and decision should be made now. If, on the other hand, application of the state law is to be required, then it is essential that this court so hold.

II

There is a Conflict Between Erie RR. Co. v. Tompkins and the Decision of the Court Below in Respect to the Standard to Be Applied in Granting a New Trial.

The rule in Oregon is well established that a trial court cannot weigh the evidence in determining whether to grant or deny a motion for a new trial when based upon the sufficiency of the evidence. *Van Lom* v. *Schneiderman*, 187 Or. 89, 95, 210 P.2d 461, 463 (1949). Its sole function is to determine whether there is any substantial evidence to sustain the verdict. *State of Oregon* v. *Moore*, 194 Or. 232, 237, 241 P.2d 455 (1952). The standard applied is identical to the standard for granting or denying a motion for judgment.

The trial court chose to disregard this admonition. The court stated that the jury verdict was "so contrary to the weight of the evidence that a new trial should be granted in any event." (Appendix B, p. 57).

Under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938), a federal court is required to apply the substantive law of the state in diversity cases. The standard for determining the right to a new trial

based upon sufficiency of the evidence certainly falls within the ambit of substantive law.

CONCLUSION

The ramifications of this case are extensive. A substantial conflict exists between the circuits. There is also a conflict between the decision rendered herein and the Supreme Court mandate established in the case of *City Services Co.* v. *Dunlop*, 60 S. Ct. 201, 203, 308 U.S. 208 (1939).

Litigants in district court may choose either a state or federal court for their forum. They are therefore entitled to know whether the sufficiency of the evidence is to be judged by a state or federal standard. If the latter, what is the standard? Under the doctrine expressed in *Erie* v. *Tompkins*, supra, a federal court in a diversity case must apply the local state law with respect to a ruling upon a motion for judgment notwithstanding the verdict or a new trial.

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

KENNETH E. ROBERTS
1200 Standard Plaza
Portland, Oregon 97204
Counsel for Petitioner.

JOHN L. SCHWABE
1200 Standard Plaza
Portland, Oregon
Of Counsel.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BEALL PIPE AND TANK CORPORATION, a corporation,
Plaintiff,
vs.
SHELL OIL COMPANY, a corporation,
Defendant.

Civil No. 62-290

INTERROGATORIES

We, the jury, answer the special interrogatories submitted to us as follows:

I. Was defendant, Shell, guilty of negligence, within the meaning of the Court's instructions, in the manufacture, formulation or processing of the asphalt product in issue in any of the particulars contended by plaintiff, Beall?

(X) YES ( ) NO

II. If the answer to the foregoing question is "Yes," was such negligence a proximate cause, within the meaning of the Court's instructions, of the harm or damage claimed by plaintiff, Beall?

(X) YES ( ) NO

III. Was plaintiff, Beall, guilty of negligence, within the meaning of the Court's instructions, in the use of the asphalt product in issue (for coating smooth pipe) in any of

the particulars contended by defendant, Shell? (X) YES ( ) NO

IV. If the answer to the foregoing question is "Yes," did such negligence proximately contribute, within the meaning of the Court's instructions, to the harm or damage claimed by plaintiff, Beall?

( ) YES (X) NO

V. Did defendant, Shell, make any warranty, either express or implied, within the meaning of the Court's instructions, to Beall relating to the asphalt product in issue?

(X) YES ( ) NO

VI. If your answer to the foregoing question is "Yes," was such warranty

Express? (X) YES ( ) NO
Implied? (X) YES ( ) NO
Both? (X) YES ( ) NO

VII. If the answer to Interrogatory V is "Yes," did plaintiff, Beall, use the porduct in a reasonable manner appropriate to the purpose for which it was intended — within the meaning of the Court's instructions?

(X) YES ( ) NO

VIII. If the answer to the foregoing question is "No," was such use of the product in an unreasonable manner inappropriate to the purpose for which the product was intended a proximate cause of the harm or damage claimed by plaintiff, Beall?

( ) YES ( ) NO

IX. If the answers to both interrogatories Nos. V and VII are "Yes," was a warranty, either express or implied, breached by defendant, Shell, within the meaning of the Court's instructions, in a respect which was a proximate cause of the harm or damage claimed by plaintiff, Beall?

(X) YES ( ) NO

X. If the answer to the foregoing question is "Yes," did plaintiff, Beall, give to defendant, Shell, the notice thereof as required by law and as explained in the Court's instructions?

(X) YES ( ) NO

Dated this 26th day of August, 1964.

EDWARD D. O'NEILL
Foreman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BEALL PIPE AND TANK CORPORATION, a corporation, *Plaintiff*,	Civil No. 62-290
vs.	
SHELL OIL COMPANY, a corporation, *Defendant.*	JUDGMENT ORDER

This case came on duly and regularly for trial on the 4th day of August, 1964, before the Honorable William T. Sweigert, Judge of the above-entitled

Court. The plaintiff appeared by and through its officers and by its attorneys, John L. Schwabe, James M. Burns, and James H. Bruce, and the defendant appeared by and through its agents and by its attorneys, Lamar Tooze, Lamar Tooze, Jr., and Arden Shenker.

A jury was duly and regularly empaneled and sworn, opening statements were made by respective counsel and evidence was introduced on behalf of the parties. Closing arguments were made by respective counsel and the Court submitted to the jury special interrogatories pursuant to Rule 49b, and the jury was duly instructed as to the law.

Whereafter said jury did retire for its deliberations and thereafter returned into court its answers to said special interrogatories which were received, and further returned its general verdict as follows, to-wit (title and caption omitted):

> "We, the jury, being duly empaneled and sworn to try the above-entitled case do find our verdict in favor of the plaintiff.
>
> EDWARD O'NEILL
> Foreman"

Whereupon said verdict was duly received, and

IT IS HEREBY ORDERED that the same be entered of record and that plaintiff have judgment accordingly.

DATED this 27th day of August, 1964.

/s/ W. T. SWEIGERT
Judge

APPENDIX B

Memorandum of Decision

Plaintiff, Beall Pipe and Tank Corporation of Portland, Oregon, had been for many years engaged in the business of producing and selling pipe—both "culvert" pipe, a corrugated galvanized product used typically for drainage purposes, and also "smooth" (sometimes called merely "metal") pipe, the ordinary metal pipe product used typically for carrying water under pressure for domestic use or for irrigation purposes.

The manufacture of pipe involves dipping the pipe in hot asphalt to achieve a protective coating of the pipe surfaces. The dipping conditions for culvert pipe are different from the conditions for smooth pipe. The dipping of culvert pipe involves use of a horizontal vat to apply the asphalt coating, but smooth metal pipe is placed in a vertical vat for the purpose.

In order to achieve a proper adhesion of the asphalt coating to the pipe surfaces, preparation of the pipe surfaces, pre-heating of the pipe, temperature control of the molten asphalt, immersion time, and other related factors are important. The bearing of these factors upon effective dipping is different for the two kinds of pipe.

In the fall of 1958, Blee, a Shell Oil Company asphalt product salesman, called on Beall to solicit its use of Shell's coating product but was told by Beall

that it was satisfied with a Witco asphalt product, called Pioneer Mineral Rubber (PMR) which Beall was then using.

In the early part of 1959, Blee called again to say that Shell was in a position to supply a product, called Shell No. 1500—"Culvert Coating Compound." According to Franklin Beall, Blee said that this Shell product would be "equal or better" than that which Beall was then using, and quoted a price which, according to Franklin Beall, was "interesting" for cost reasons.

Blee was told that Beall would give Shell a chance to furnish the Shell coating for culvert provided the Shell product could meet the State Highway Department shock test for culvert pipe coating and provided also that the Shell product would be compatible for mixing in its vat with the culvert coating Beall had been using (the Witco PMR and also an American Bitumuls product which Beall had also been using) for its culvert pipe.

Blee called in Mertz, a Shell technician, and the latter handled the compatibility tests and also the State Highway Department tests required for culvert coating. When Beall was satisfied by Shell that both its conditions had been met, it placed its orders for Shell Culvert Coating Compound and commenced to use it about July, 1959, in its horizontal vat for coating culvert pipe. It was not initially used in the vertical vat for smooth pipe.

However, about three months later, in October,

1959, Beall started to use the Shell Culvert Coating Compound, not only for its culvert pipe, but also for its smooth pipe instead of the Witco PMR which it had been using for that purpose. Beall had discontinued Witco about July, 1959, to temporarily use a Union product which it had on hand, until it finally switched to Shell Culvert Coating Compound for coating of smooth pipe in October, 1959.

In June of 1960 Beall began to receive numerous claims from its pipe customers that the coating on smooth pipe was flaking or peeling from the pipe surface.

This diversity jurisdiction suit was commenced in 1962, to recover damages from Shell in the amount of those customer claims upon the grounds: (1) that Shell was guilty of *negligence* in the manufacture, formulation and composition of its Shell Culvert Coating Compound; and (2) that Shell was guilty of *breach of warranty* that the Shell Culvert Coating Compound would be "equal to or better than" the product Beall previously used, Witco PMR, for *smooth* pipe.

No claim is made in this suit for any failure of the Shell product occurring on culvert pipe to which it was applied by Beall. (See Pre-Trial Order p. 2, Par. V, p. 6, Par. II.) The claimed failures of which Beall herein complains occurred, not on culvert pipe, but on smooth metal pipe. (Id.)

The theory of defendant, supported by evidence at the trial, was that the flaking or peeling of its prod-

uct from smooth pipe was due, not to any negligent or improper manufacture or composition of the Shell Culvert Coating Compound, but to Beall's negligent or improper application of the product to smooth pipe, i.e., in such manner that no lasting bond was achieved between the asphalt and the pipe surface; that the Shell product, although intended, manufactured, designed and sold by Shell and its processor Trumbull, only for culvert coating, would, nevertheless, have retained its adhesion—even on smooth pipe—if it had been properly applied in the vertical smooth pipe vat; that Shell did not make any warranty of suitability of its culvert coating product for smooth pipe, as distinguished from culvert pipe, and that defendant did not rely on any such warranty in deciding to use it for smooth pipe as well as culvert; that in any event the terms of the only warranty claimed by plaintiff, i.e., that the Shell product, if used on smooth pipe, would be "equal or better" than the Witco product previously used, were not in fact breached because the Witco product, as applied by Beall to its smooth pipe, similarly flaked and peeled and, further, that in any event, plaintiff did not give to defendant the timely notice required by law to support plaintiff's warranty cause of action.

The case was tried to a jury in August, 1964, for nearly a month, upon the issue of liability only—pursuant to a pre-trial order of August 4th. A general verdict was returned in favor of plaintiff—accompanied by answers to interrogatories submitted to the jury under Rule 49(b).

Defendant, Shell, has moved under Fed. Rules Civ. Proc., Rule 50(b), for judgment in accordance with its motion for a directed verdict, or, in the alternative, for a new trial.

Defendant asserts 37 separate grounds for its motion. Some of these grounds arise out of claimed errors of law by the Court in its instructions to the jury, in its ruling on admission of evidence and in its interrogatories to the jury.

The Court has carefully re-examined these matters in the light of the briefs and oral arguments on this motion and has reached the conclusion that its instructions to the jury (See Tr. pp. 2275-2317; pp. 2554-2584) were legally correct and adequate, that its rulings on evidence were proper, that its interrogatories to the jury (See Tr. pp. 2579-2582) were in proper form and the answers thereto *legally* consistent with the general verdict, that no prejudicial or clear error appears and that these asserted grounds of motion are not valid grounds for a new trial.

However, the Court has also re-examined other grounds of the motion which raise the questions, first, whether the evidence in the case was sufficient to warrant submission to the jury of either the negligence or breach of warranty issues and, second, whether the evidence on these issues is so insufficient to support the verdict, or the verdict so against the weight of the evidence, that in any event a new trial should be ordered.

The Court has carefully re-examined these mat-

ters, not only in the light of the briefs and oral argument on this motion, but also in the light of a reading of the transcript of the trial to test the misgivings and reservations with which the Court submitted these issues to the jury under Rule 50(b).

This further examination has confirmed the view of the Court that the evidence is so insufficient to support the verdict, and the verdict so contrary to the weight of the evidence that in any event a new trial should be ordered.

The Court has reached the further conclusion that the evidence on the issue of defendant's negligence and the evidence on the issue of warranty in respect to the suitability of defendant's product for use on smooth pipe, is wholly insufficient or, at least so insubstantial and lacking in probative value that defendant's motion for a directed verdict should have been granted and that an order for entry of a verdict in defendant's favor should now be ordered with the alternative provision that, in the event this order should for any reason be set aside or reversed on appeal, an order for a new trial of the issues, unless also set aside or reversed on appeal, should remain in effect. (See Rule 50(c) and *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957)).

In fairness to counsel and to any court of review the Court sets forth the reasons for this ruling. The Court is mindful that the test for the propriety of judgment notwithstanding the verdict is whether in

this case, disregarding conflicting evidence in favor of the defendant and giving to plaintiff's evidence all the value to which it is reasonably entitled, therein indulging in every reasonable inference favorable to plaintiff, there is evidence of sufficient substantiality and probative value to support the verdict in favor of plaintiff.

THE NEGLIGENCE ISSUE

We will first apply this test to the issue of defendant's alleged negligence in the manufacture of its Culvert Coating Compound, an issue resolved by the jury against defendant.

Whatever other considerations may be involved in this case concerning the breach of warranty issue, negligence means the failure of a manufacturer to exercise reasonable care—doing something which an ordinarily prudent manufacturer would not have done, or failure to do something which an ordinarily prudent manufacturer would have done, in the same or similar circumstances.

What evidence in this record justifies an inference that the Shell product here involved, Shell Culvert Coating Compound, was so "negligently" manufactured by Shell (or rather by its processor Trumbull) as to be defective for its intended use?

Apart from warranty, the mere fact that a user of a product who applies it to his own end use encounters failure of his end product, does not, itself, justify a finding that the failure was due to negligence on the

part of the manufacturer of the product used. Even proof that a particular harmful effect would not have occurred if the product had been compounded or designed differently (although pertinent to the issue of a manufacturer's warranty) does not necessarily support a finding of *negligence* on the part of the manufacturer.

The evidence upon which plaintiff relies to support its allegation of negligence can be considered under two headings: (1) the 1960-1961 correspondence and (2) expert testimony.

THE 1960-1961 CORRESPONDENCE

Plaintiff relies on certain correspondence between Shell and its processor, Trumbull. This correspondence refers to activities on the part of Shell and Trumbull following their first knowledge that Beall had encountered flaking or peeling of coating on Shell dipped smooth pipe. This correspondence (Pltf. Ex. 9a [1 to 8]) begins on September 29, 1960, after Beall had first mentioned such flaking or peeling to Shell salesman Blee, and continues through November and December, 1960, into February, 1961.

This correspondence indicates on its face that it is based upon information supplied by Beall concerning how Beall had applied the Shell coating to the smooth pipe and is based also upon the assumption, suggested by Beall, that the previously used Witco coating had *not* failed. It further indicates that during the period of the correspondence no claim had as

yet been made as late as February, 1961, by Beall for any breach of warranty, negligence or other responsibility on the part of Shell for the failures in question.

In substance the correspondence shows continuing attempts by Shell and by Trumbull to work up a coating that would meet Beall's desire to use a single coating for both culvert pipe and smooth pipe and *still meet the State Highway Department shock test* for culvert compound. These attempts appear to have resulted in the conclusion by Shell and Trumbull that, although the regular Shell Culvert Coating Compound should be supplied and used for corrugated, galvanized (culvert) pipe, any attempt to use the single product for *both* culvert and smooth pipe should be only upon the basis of trial and observation by the customer.

It may well be that this correspondence constitutes evidence in the nature of an admission by Shell and Trumbull that the Shell Culvert Coating Compound sold to Beall in July, 1959, was not, in fact, suitable as a single coating for *both* culvert and smooth pipe, as used by Beall after October, 1959 — and in that sense evidence of breach of any warranty that it *would* be suitable for *both*. Whatever may be the relevance of this evidence to the warranty issue, it cannot by any stretch of speculation be regarded as evidence, admission or otherwise, of *negligence* in the manufacturing composition of the Shell Culvert Coating Compound sold to Beall—at least so far as its use on culvert pipe is concerned. In fact, the correspon-

dence indicates the contrary on its face, i.e., that the Shell Culvert Coating Compound should still be supplied and used for corrugated, galvanized, i.e., culvert, pipe.

Beall makes no claim in this case for failure of the product as used on culvert pipe, nor is there any substantial evidence in the record that it did so fail on culvert pipe. (Pre-Trial Order pp. 2, 6.) As stated by Wilkins, Beall's sales manager: "It was satisfactory on culvert pipe, or at least I had heard no claims." (Tr. p. 457). Beall's claim in this case is that the Shell Culvert Coating Compound failed in use as applied by Beall, not to culvert pipe, but to *smooth* pipe. (Id.)

Whether the foregoing correspondence can be regarded as an admission of negligence in the manufacture or formulation of the product as used by Beall on *smooth* pipe, depends upon whether the product was ever manufactured or formulated as a coating intended for use as a single product on both culvert *and smooth* pipe.

Actionable negligence of a manufacturer must necessarily relate to some deficiency of the product in respect to the use for which it was manufactured, designed and intended by the manufacturer.

Except only to the extent that Shell may have *otherwise warranted* to Beall in this particular transaction, the evidence in the case is uncontroverted to the effect that Shell Culvert Coating Compound was manufactured, designed and sold by Shell and also

its processor, Trumbull, for use only on culvert pipe —as its very trade name indicates.

This is clear from the otherwise uncontroverted testimony of the Shell witnesses, Blee, Beuker and Mertz and the Trumbull witnesses Ellis and Lindquist, to the effect that the product, which Shell called Culvert Coating Compound, had been manufactured and sold for use on culvert pipe; that it had been so used on the east coast without complaint by such customers of Trumbull as Armco; that it had never (up to the time of its use by Beall as a single coating for both culvert and smooth pipe) been formulated, intended or sold for such purpose, and that eventual knowledge of such use by Beall came as a surprise to both Shell and Trumbull—not because of any reason to believe it would not adhere to smooth pipe if properly applied, but simply because it had been intended and formulated not for smooth pipe but as a culvert coating capable of meeting customary highway department requirements for culvert pipe shock test and because no one until Beall had ever raised the question of its use on smooth pipe.

Plaintiff (except to the extent of its evidence as to salesman Blee's claimed *warranty* to the contrary in this particular transaction—later to be discussed) has not produced any contrary evidence sufficient to support a finding or an inference that the product was manufactured, formulated or compounded for smooth pipe or for anything except, as indicated by its name, *culvert.*

If, as shown by uncontroverted evidence, (except plaintiff's evidence of *warranty* to the contrary in this particular transaction) the Shell Culvert Coating Compound was originally manufactured, designed and sold by Shell and its processor Trumbull, for use on *culvert* pipe and if, as we must assume upon the record of this trial, it did not fail on culvert pipe, we cannot see how it could be inferred that the above-mentioned correspondence constitutes an admission, or any evidence that it had been *negligently* designed or composed or that it was defective for the originally *intended and indicated use* for which it was manufactured. It should be noted, as well, that all, or virtually all of Beall's purchase orders to Shell call for "Shell Culvert Coating Compound." Shell's invoices to Beall have the same description. (See Def. Exhibits 110-A-22 through 482 with certain exceptions noted at pp. 1454-1457 of the transcript.)

To hold that a manufacturer, who designs, describes and markets a product for use on *culvert* pipe, is negligent for not manufacturing or designing it for smooth pipe as well would—*in the absence of some warranty*—be unreasonable and quite unfair to the manufacturer.

The Court, therefore, concludes at this point that it could not possibly be found or inferred from this 1960-1961 correspondence that Shell had *negligently* manufactured, designed or compounded its Culvert Coating Compound—a product which did *not*, in fact, fail for its originally intended, stated use, or in its

actual use by Beall and other users on culvert pipe, unless plaintiff has other evidence from which negligent manufacture can be found or inferred.

EXPERT TESTIMONY

To support its claim of negligence plaintiff also relies upon the testimony of two expert witnesses—a Dr. Traxler and a Dr. Marian—who testified to the effect that in their opinion analysis of the Shell Culvert Coating Compound showed that it was of poor durability in that it was so compounded of its various component elements — asphaltenes, resins, oils and paraffins—that in the course of time a chemical change would occur in which the asphaltene content could increase at the expense of the resin and part of the oil, and cause cracking or hardening of the asphalt; that, according to Traxler, the "major cause" of the adhesion failures in question was the composition of the Shell asphalt as compared to other asphalts; that, according to Marian, the Shell asphalt was "faulty" in varying degrees as compared to other asphalts. This testimony was directed to the Shell culvert coating product as it was used, and as it performed or failed to perform when applied to *smooth* pipe.

Neither expert could satisfactorily explain why, if the failure of the Shell coating was due to its *inherent* lack of aging quality (as distinguished from spotty, improper bonding, i.e., improper application by Beall) it would not fail also on culvert pipe—as to which there is no substantial evidence of failure and

as to which Beall makes no claim in this action.

Giving full weight and effect to the testimony of these experts, there still remains the failure of proof which we have already noted; i.e., a failure of proof that the Shell product was manufactured and formulated for intended use as a single coating for both culvert and *smooth* pipe. In the absence of such proof, it could not be found or inferred from the testimony of these experts that any durability deficiency of the product was related to an intended use for which the product was manufactured.

Of course, if the product was, nevertheless, sold by Shell, through its salesman Blee, under a warranty assurance that it *would* be suitable for use on smooth pipe as well as culvert pipe, then, of course, Shell might be liable to Beall. But, the liability would arise out of breach of the warranty—not out of negligence in the original manufacture or formulation of the product.

Before taking up this warranty issue we should note a second reason for the Court's conclusion that there is no substantial evidence of probative value of negligence in the manufacture of the product.

Dr. Traxler, a professor of chemistry and physics at Texas A. & M., claiming special knowledge of asphalt, conceded that his knowledge of asphalt pipe dipping operations was obtained during a single visit of less than one hour to the Beall plant. He testified that he was given samples of asphalt coating—samples of the Witco product, of the Shell product and of

a later Trumbull No. 1150 product; that he proceeded to analyze their respective components — asphaltenes, resins, oils and paraffins; that he computed an index or coefficient of the ratios of these components in the respective samples; that in his opinion this index or coefficient shows the relative aging quality of the samples; that the coefficient for the Witco asphalt was .44, for the 1150 Trumbull asphalt .37, and for the Shell asphalt 1.17; that the higher the index number the less the aging quality; that, based on his formula, the Shell sample in his opinion would ultimately be "the least durable" of the three. (Tr. p. 1389).

The witness was then shown, for the first time in Court, pltf. Ex. 53, a piece of pipe dipped in the Shell product and recovered after service. He testified that on visual observation the coating on the outside of the pipe seemed harder than the coating on other similar pipe and that the coating on Ex. 53 had "lost its tackiness and its adhesion to the pipe." (Tr. p. 1395).

He was then asked his opinion upon a hypothetical question, i.e., assuming smooth pipe dipped on the Shell material, appearing to have a good, well attached coat after dipping, that the material becomes hard and brittle and flakes off the inner and outer surfaces of the pipe from 2-3 months to 2 years later, whether in his opinion there had been a change in the chemical composition of the asphalt? He answered that in his opinion there would be cracking, hardening of the asphalt with time—an increase in the asphaltene content at the expense of the resin and part of

the oil—a transition of those unstable methods [sic] into the stable asphaltenes; (Tr. p. 1396-1397); that in his opinion "the major cause" of the lack of adhesion of the Shell asphalt was the composition of the asphalt as compared to other asphalts. (Tr. p. 1471).

On cross examination he testified that he did not know how long it takes in service for such aging to occur in these asphalts—that all he could say is that "the stability of the asphalt would vary and the rapidity with which the resins and cyclics converted into asphaltenes would vary considerably," (Tr. p. 1419); that the *only way* he could tell the rate of aging was "just looking" at the coating on samples of asphalt on Beall's smooth pipe that had actually become hardened (Tr. p. 1477), i.e., from samples of asphalt that had flaked or peeled in service (Tr. p. 1481); that Ex. 53, which he had previously described as having lost its coating adhesion on the *outside* surface, nevertheless seemed pliable, i.e., all right on the *inside* surface of the *same* pipe; that he did not know what would cause this pipe, Ex. 53, to fail on the outside and remain pliable on the inside—although this was the specimen on which he based his conclusion that the Shell asphalt was unstable (Tr. 1485); that he could not explain "the inside of the pipe situation; that has remained softer than the outside"; that the asphalt on the "outside of some of these other pipes remains soft and pliable and tacky" (Tr. p. 1486); that he had no reason to suppose that the resins of the Shell pipe could convert into asphaltenes—*except* from noting this hard asphalt on the *outside* (of Ex. 53) (Tr. p. 1489-90).

Dr. Joseph Marian, a professor of chemistry and physics at the University of California conceded that his first experience with pipe coating asphalt arose out of his work for Beall in this case. He also testified that a Roseler formula, upon which he relied for his analysis and opinion on the durability of the Shell pipe coating, was developed for *paving* asphalt. He testified, however, that the same principles would be applicable here.

He testified in effect that he was first called in by Beall in January, 1962—about a year and a half after Beall's knowledge of its pipe coating failures—"to determine the cause." He visited the Beall plant and observed their dipping operations as they were being conducted in 1962-1963. He first took pieces of metal plate from which Beall makes pipe, dipped them in Shell asphalt coating, under conditions similar to the 1962-1963 conditions he observed at the Beall plant (which had changed in some respects since the pre-failure conditions of 1959) and put the plates to severe weathering tests which would produce aging very rapidly. (Tr. p. 1032-35); that "[a]lmost for two years we fiddled around with these samples *without any results*, until finally we observed, in these cycling submersion tests, at the edges the asphalt layer coating gets thinner, the beveled edge, that they started cracking; and from there on we continued with these plates, and finally after ten months the laboratory samples [referring to pltf.'s Ex. 1 and 3] exhibited the same type of failure as many of the pipes which were used in practice." (Tr. p. 816-817); that

"in some places superficial and some places a rupture of the coating, which goes plainly clear through the metal, which is very similar to failures which occur on the pipelines . . . premature aging, I would say . . . and adhesion failure" (Tr. p. 818) that this was first observed "[a]fter ten months in treatment after this cycling in water and drying." (Tr. p. 826).

The witness later conceded, however, that the pipes he dipped experimentally had *not* failed, *the adhesion is still good.*" (Tr. p. 1041).

The witness testified that at this point of his investigation—several years after Beall's knowledge of the flaking and peeling—"more and more suspicion concentrated, naturally, on the material, on the asphalt" (Tr. p. 1020) as the cause of the failures—as distinguished from failures due to possible improper bonding in the application of the coating by Beall to the smooth pipe.

He then commenced a second, different series of tests to determine the chemical composition of pieces of Shell asphalt actually scraped from Shell-dipped Beall pipe that had been recovered after service—and also some unused Shell asphalt (Tr. p. 839 & 845). His test of the Shell asphalt was quite similar to the test used by Dr. Traxler—determining its basic components, the percentage of the components, the ratio of the components, and then applying a mathematical formula, originated by one Roseler as a durability test for paving asphalt, in order to come up with what the witness described as a numerical index

of the durability quality of the Shell asphalt pipe coating.

His test is exemplified in pltf. Ex. 50—a chart—which comes up with numerical index figures ranging from .39 to .78 for the Shell asphalt, indicating in his opinion, based on Roseler, various degrees of "poor aging quality" ranging from "poor" (.78), "slightly better" (.44), and "moderately poor" (.46). When the witness came to the index of .39, which approaches .24 (which the witness said would be "good," according to his formula) he applied what he described as an "exception" to show that this sample would, nevertheless, also be counted "poor" because of a "high paraffin content." (Tr. pp. 851-865, 1056-1058); that in his opinion and for these reasons the chemical composition of the Shell asphalt was "faulty" in respect to "premature aging" quality; that "all asphalt compounds change their chemical composition and their physical properties with age . . . some asphalt compounds age rapidly . . . and other compounds are more stable and keep their mechanical properties for a longer time." (Tr. p. 834).

Both expert witnesses conceded that any asphalt when used to coat metal must be properly melted to achieve a close bonding to the metal surface; that surface preparation of the pipe, preheating of the pipe, temperature control of the molten asphalt, immersion time and other related factors are important and that, if improperly applied, the asphalt will not achieve lasting bonding—adhesion—to the pipe.

Although neither expert had knowledge of the conditions under which the Shell coating had been actually applied to smooth pipe by Beall in the critical years 1959-1960, both stressed the comparative lack of durability of the Shell composition itself as the villain of the piece—Traxler stating that this was "the major cause" of eventual failure and Marian stating that the composition was "faulty" in respect to aging quality. It should be parenthetically noted here that the jury found in its answers to the Court's interrogatories that Beall itself was guilty of negligence, within the meaning of the Court's instructions, in its use of the asphalt product (for coating smooth pipe) in the particulars contended by defendant (Interrogatory III), but, nevertheless, rendered its general verdict in favor of plaintiff upon its further finding that such negligence of Beall did not proximately contribute to the harm or damage claimed by plaintiff. (Interrogatory IV).

The Court is of the view that the finding of Beall's negligence was amply supported, if not compelled, by the evidence. (See testimony of Beall witnesses, J. Beall, F. Beall, Williams, Bryant, Elle, Quintieri, Sanner, Bass, DeLashmutt, etc.). Although the finding that it was not a proximate cause of Beall's damage was within the power of the jury, the Court is of the view that this latter finding is so against the weight of the evidence that a new trial should be granted on that score in any event.

It should be here further noted that for the purpose of entry of judgment notwithstanding the ver-

dict, the Court expressly eliminates from consideration the jury's affirmative finding of Beall's negligent use of the product in its application to its smooth pipe. This motion is being granted not upon the ground of Beall's contributory negligence, but upon the ground of lack of proof of negligence on the part of defendant Shell in the manufacture of the product in any respect related to the use for which it was manufactured.

Continuing our review of the expert testimony of Traxler and Marian, neither expert could explain why, if the failure of the Shell coating was due to its inherent lack of aging quality (as distinguished from improper application), it did not fail on about 80% of the smooth Beall pipe still in service, or why it did not fail on some parts of the same smooth pipe, e.g., failure on the outside but not on the inside, or why no adhesion failures ever developed during the two years of experiments with Shell-dipped Beall pipe by Dr. Marian in his first series of field tests. Nor did either expert ever explain why, if chemical change of asphalt occurs only with "time," some of the failures asserted by Beall were discovered within a period of a few weeks after the dipping of the pipe.

Nor is there any evidence, expert or otherwise, to explain why, if the Beall smooth pipe failures were due to the comparatively poor aging quality of the Shell product, the same kind of smooth pipe coating failure occurred during about the same period on pipe dipped with Witco PMR coatings—a standard coating which Beall claims it had been using successfully on

such pipe for many years up to mid-1959—except only the suggestion by Beall that the Witco coating must also suddenly have developed a similar poor aging quality.

Neither of these experts, nor any other witness, testified to any standard or custom or practice known or available to the industry from which Shell, or Trumbull its processor, departed in the manufacture, design or composition of Shell Culvert Coating Compound. It has been held that there is no rule of law that the opinion of an expert upon a manufacturer's claimed faulty design or composition must necessarily contain or be accompanied by evidence of some existing safety standard or established practice by which the opinion of the expert must be judged. (See Bill v. New England Cities Ice Co., 10 A.2d 662 (N.H. 1940); Varas v. Barco Mfg. Co., 205 Cal. App. 2d. 246, 22 Cal. Rptr. 737 (1962).)

However, the mere fact that experts may express critical opinions concerning the technical design or composition of a manufacturer's product should not be invariably sufficient to support a finding that a manufacturer who follows the advice and experience of his own technicians, has been guilty of negligence. See, Dilingham v. Chevrolet Motor Co., 17 F. Supp. 615, 618 (W. D. Okla. 1936).

Nor should the mere fact that an expert has expressed opinions in favor of plaintiff to the effect that the design or composition of a machine or product is faulty, prevent reversal of a plaintiff's verdict for in-

sufficiency of evidence if the expert testimony, considered in the light of the whole record, is insubstantial because of lack of knowledge of pertinent factors, inconsistent admissions, non-analogous tests, evident unfamiliarity with the practical aspects of the product in use, or inability to explain admitted physical facts.

Reversals upon such records have been granted in cases like *Federal Electric Co.* v. *Taylor*, 19 F.2d 122, 125 (8th Cir. 1927); *Dobbin* v. *Pacific Coast Coal Co.*, 170 P.2d 642 (Wash. 1946); *Yaun* v. *Allis-Chalmers Mfg. Co.*, 34 N.W.2d 853 (Wis. 1948). (See also: Reusch v. Ford Motor Co., 82 P.2d 556 (Wash. 1938). evidence of faulty design held insufficient as a matter of law. See also, (re rejection of expert testimony as to faulty design by triers of fact), Simmons v. Gibbs Manufacturing Co., 170 F. Supp. 818 (N.D. Ohio, 1959); Altrichter v. Shell Oil Company, 170 F. Supp. 851, 853 (D. Minn. 1957).)

For the foregoing reasons the Court concludes that, whatever may be the merits of plaintiff's warranty cause of action, there is no evidence in the case to support a finding or an inference that either Shell or Trumbull its processor, was negligent in the design, formulation or manufacture of the product in any respect related to the use for which it was *intended and manufactured.*

THE WARRANTY ISSUE

Our conclusion that the Shell Culvert Coating Compound has not been shown to have been *negligent-*

ly designed or compounded by Shell, does not necessarily dispose of the case. There remains the issue whether Shell, regardless of the originally intended and indicated purpose of its product for *culvert* pipe, did, nevertheless, warrant either expressly or impliedly, to Beall that the product would be also suitable and fit for use by Beall on smooth pipe.

The evidence upon which plaintiff relies to support its warranty cause of action is substantially as follows:

Having ordered Shell Culvert Coating Compound through Shell salesman Blee in July, 1959, for use on culvert pipe, Beall decided, in October, 1959, to order it for use on smooth pipe as well—under the following circumstances as shown by the evidence most favorable to plaintiff.

In September 1959, Mr. Blee again called on Beall to discuss the performance of the product and to solicit further business. He was told by Franklin Beall that the company would naturally like to save freight on all its coating compounds and that he, Franklin Beall, would discuss the matter with other members of the firm to "see what their reaction is about letting you sell us Shell dip for the vertical vat" (i.e., for smooth pipe) (Tr. p. 292).

According to Franklin Beall, Blee had "assured me on every occasion" that the Shell product was "equal to what we were using . . . [t]hat it was equal or better than the material we were using." (Tr. p. 293).

John Beall concedes, however, that when Blee spoke to him just before being referred to Mr. Franklin Beall, Blee "was thinking of pipe dip for the culvert vat . . . [h]e offered it for that purpose." (Tr. p. 146).

Nevertheless, according to Franklin Beall, salesman Blee later also solicited Beall for use of the product also on its smooth pipe.

According to Franklin Beall, while Shell salesman Blee waited in the office, he, Franklin Beall, held a private conference in another office with others of the firm—Mr. John Beall, President, Mr. Wilkins and a Mr. Elle, "to discuss, at the savings in price, what we were getting, whether we would buy a dip from Shell Oil or continue with Witco or Pioneer," saying to his associates that Blee had claimed the Shell product would be "equal or better" than the material we were using and "we decided at that meeting to buy Shell product for the vertical vat," i.e., for smooth pipe, and "I went out and told Mr. Blee . . . that we were going to buy it on the provision of his statement . . . and he related the same statement that it would do everything that our present dip did, or better." (Tr. pp. 296-298).

Wilkins, the Beall salesmanager, attended this meeting and describes the occurrence by saying: "We had been attending a meeting in Mr. John Beall's office discussing whether or not we were going to use Shell dip on smooth pipe, and the meeting broke up, and I came out, and Mr. Blee was standing there, and

I mentioned to him that we had decided to use his Shell dip for smooth pipe and I hoped that everything worked out all right . . . He says, 'Everything will work out all right.'" Then, in the doorway or near the doorway of Franklin Beall's office, Wilkins heard Mr. Blee say to a Mr. Whitcomb, a passing Beall salesman, "Shell dip would do everything that Pioneer Mineral Rubber would do." (Tr. p. 449).

Franklin Beall readily concedes that, when Blee first called on the Beall organization, Blee did not even know what kind of product he was to supply to get Beall's business and that he had never been through the plant. The Bealls also concede that they did not know and had never inquired whether Blee knew anything about the dipping of pipe, or about the different procedures for dipping smooth pipe as distinguished from culvert pipe. The Bealls concede that, although Blee had seen the plant, they did not know whether he was familiar with the Beall plant or its dipping processes. They concede that Beall never received, *and never asked* for any information or assistance of any kind (except concerning Beall's two conditions, already referred to, in connection with their July, 1959 purchase for culvert purposes) from Blee, or from Shell through Blee, or from anyone else. They concede that they never discussed with Blee the methods or problems of pipe processing or the different methods for coating culvert and smooth pipe. They concede that they never discussed the subject of suitability of Shell Culvert Coating Compound for smooth pipe and that Blee never made any statements on the

subject—except to the extent of the single claimed remark above mentioned.

Beall concedes that it relied *solely* on Blee's card, indicating that he was a Shell asphalt sales representative, and upon Blee's alleged statement, when told they had decided to use the Shell product on smooth pipe as well as culvert, to the effect that Shell's product would do everything that another product would do or better.

Both Shell salesmen Blee and Beuker (the latter another Shell salesman who also called on Beall), both testified to the effect that, although Blee had sold and recommended the product for culvert pipe use, no comment of any kind was ever made by either of them to Beall on the subject of the fitness of Shell Culvert Coating Compound for use on *smooth* metal pipe, as distinguished from culvert pipe, and that in fact they knew nothing about that subject and would have had to refer any such inquiries to the Shell technical department and that they were not even aware of Beall's decision to use it on smooth pipe until after Beall commenced to do so. However, we must assume for the purposes of the present motion for judgment that the Blee remark was made as testified to by Franklin Beall and Wilkins. Beall contends that it relied on this remark in ordering Shell Culvert Coating Compound for use in its smooth pipe operations.

However, John Beall testified that the reason Beall started using the Shell product on culvert pipe in July, 1959, but did *not* use it on the smooth metal pipe un-

til the following October, was that "we weren't convinced that it was the right coating for smooth pipe, culvert [is] used for drainage water, not drinking water, and we had to be convinced it was the right pipe [sic] and we were finally . . . We weren't thinking of taste so much as blistering and coming off . . . We were worrying about all the products we buy. We want to make sure they do what they're represented to do." (Tr. pp. 181-183).

Mr. Nolf, plant superintendent of Beall from 1958 to June, 1960, testified to the effect that prior to Beall's purchase of the Shell product he made actual field tests, in which Williams (in charge of dipping) participated, of the Shell asphalt over a period of two to four months. In these tests pipe was coated with the Shell product and weathered and, although at first it was decided that the Shell product was not satisfactory for smooth pipe, it was later decided by Beall that further tests showed that it adhered to the metal and was satisfactory for use on both culvert and smooth pipe (P. 1694 et. seq.). This testimony is, to some extent, corroborated by testimony of Beall's dipping foreman Williams, on the subject of prior field testing the Shell asphalt to see how it would work on smooth pipe (p. 376-377).

Nevertheless, for the purpose of the present motion we must assume that the Beall decision to use the Shell product for smooth, as well as culvert pipe, was made in reliance upon what the evidence shows to be a *single statement* made by salesman Blee to the effect that the Shell product would be "equal or better"

than the Witco product previously used. We must further assume that any such remark was directed, not merely to prospective use of the product for culvert, as claimed by salesman Blee, but also to prospective use on smooth pipe, as claimed by Beall. We will also assume for the purposes of the present motion that such a remark of salesman Blee was in this particular context not mere "dealers talk," or "puffing" as argued by defendant, but an affirmation of fact or promise within the meaning of the law of warranty as contended by plaintiff.

Assuming all this, there is still no dispute that the Shell product *did* in fact prove to be "equal to," if not any "better" than, the Witco PMR product as the latter had been previously applied by Beall to smooth pipe. Plaintiff does not deny that the Witco PMR product which it had been using for both culvert and smooth pipe, had failed by flaking and peeling from the smooth pipe in the same manner as the Shell product peeled. Defendant introduced in evidence a "partial" list of the names of at least 59 separate customers of Beall whose smooth pipe, coated with the *Witco* product, so failed and plaintiff concedes that it eventually discovered these Witco failures in 1960-1962.

Plaintiff's only point is that in September, 1959, when it switched from Witco PMR to Shell Culvert Coating Compound for the coating of smooth as well as culvert pipe, it did not know that the Witco coating had in fact failed.

There is *strong* testimony of the witness Berger, a Witco representative, based on note entries made at the time, that Franklin Beall *did* have such knowledge and informed Berger on September 8, 1959, before Beall's switch from Witco to Shell for smooth pipe, of 7 or 8 major failures of Witco and showed Berger a failed sample. Franklin Beall testified, however, that, although he remembered Berger calling on him, he did not so state to Berger—"to my knowledge."

There is also uncontradicted evidence in the record that, while Beall was using Witco PMR in its vertical vats for smooth pipe, the Witco company was making monthly tests of asphalt samples taken from the Beall vats and that, for some time prior to September, 1959, the Witco monthly test reports were warning Beall that the Witco asphalt, although standing up in the horizontal, culvert pipe vats, was not staying up to melting point specifications in the vertical, smooth pipe vat—reports to which Franklin Beall paid no attention, merely turning them over to the plant foreman who paid no attention to them either. John Beall also conceded that those Witco monthly reports indicated that the Witco asphalt was being drastically reduced in its melting point, although the warning did not come to him personally and he did not know how drastic the changes were. However, we must discard such evidence for purposes of the present motion for judgment in order to consider the record in the light most favorable to plaintiff.

Even if such evidence is discarded, one basic fact

still remains without dispute, i.e., the Witco product failed on smooth pipe *just as the Shell product did*—whether or not Beall actually knew about such Witco failures in September, 1959. Thus, the terms of the only claimed warranty upon which plaintiff relies, i.e., that the Shell product would be at least "equal" to Witco PMR for the purpose were not breached.

Plaintiff argues that the statement of Shell salesman Blee should be construed to mean that the Shell product would be "equal" to Witco PMR *in the sense of* "the *then* (i.e., September, 1959) known results and performance" of the Witco product as used and experienced by plaintiff on smooth pipe for some years preceding.

According to this argument, the bare remark of Mr. Blee, which in its context can be only doubtfully regarded as a warranty at all, must be further stretched beyond its limited terms, i.e., that the Shell coating would be "equal to or better" than Witco, to include another different term or interpolation in the nature of an unqualified warranty of the Shell Culvert Coating Compound for smooth pipe—something that Blee never said, always giving his alleged assurances in terms of "equal or better" than Witco. We do not consider that the evidence is sufficient to support any such interpolation of the limited terms of the only express warranty upon which plaintiff relies.

From the foregoing reasons it also follows that plaintiff's further theory of breach of an implied

warranty, as distinguished from an express warranty, of reasonable fitness for the purpose for which Beall claims to have purchased the product, i.e., for use on *smooth* pipe, is likewise without support in the evidence for the reason that an essential element of any such implied warranty, i.e., *reasonable reliance* by the buyer upon the skill and judgment of the seller, *is wholly lacking*. Upon the record here, any reliance by Beall upon the skill and judgment of Shell in respect to the fitness of Shell Culvert Coating Compound could not have exceeded the claimed explicit, limited statement of salesman Blee, i.e., that the product would be "equal to or better" than the Witco product previously used by Beall for the purpose of coating smooth pipe. There is no evidence that the Shell product proved to be not equal to the Witco product—even if the evidence shows it was no better. As far as any warranty of merchantability is concerned, there is no substantial evidence that it was not merchantable in the sense of that term as used in the law of warranty. It was merchantable as a culvert pipe coating compound, and it even proved to be so on about 80% of the smooth pipe to which Beall applied it.

NOTICE OF BREACH

However, it is not necessary to rest disposition of the warranty cause of action upon the single point of failure to prove a breach of such warranty.

There is a failure of proof in another respect which we regard as fatal to plaintiff's theory of re-

covery for breach of warranty—either express or implied—the failure to give the notice of breach of warranty as required by Oregon law, ORS Section 75.490, (Uniform Sales Act, Section 49), which provides: ". . . But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

The evidence in the pending case on the subject of notice is substantially as follows:

According to Mr. Wilkins (See Wilkin's testimony, Tr. p. 447 et. seq.), numerous customer claims of peeling failure of Shell coating on the inside of smooth pipe came to Beall in June 1960. A list of such claims, compiled in plaintiff's pre-trial statement, shows that at least two of such failures had been discovered by Beall customers as early as April, 1960, three as early as May, 1960, seven in June, 1960 and seven in July, 1960.

This compilation shows that these complaints involved pipe which had been actually Shell dipped at the Beall plant in March-April, 1960, and which flaked or peeled, as discovered by Beall customers, as early as April-May, 1960—only a month or so after the actual dipping of the pipe at the Beall plant.

Although numerous Beall customer complaints were received by Beall in June, 1960, it made no contact whatsoever with Shell until "the latter part of 1960"—but even then it made no claim of fault

against Shell. Wilkins, the Beall sales manager, testified that he merely phoned Shell salesman Blee—"it wasn't very much of a discussion. I just simply reported that we were having some trouble with the dip coming off and wondered if it was not his product that was causing it." But Blee said "he didn't see how it could be." No arrangements for getting together after that were made at that time (Tr. pp. 450-452).

Wilkins did not contact Blee again until "the spring of 1961 when the claims really started to come in in terrific number," and then by telephone, saying "we had never experienced anything like this before . . . and I felt sure there must be something wrong with the dip, would he (Blee) see me the next time he came to Portland." In response to the question, "was there any discussion about damages or anything like that?" Wilkins replied, "Not on that first call." The "only reference to damage was when he [Blee] came to Portland." (Tr. pp. 452-453).

Wilkins then fixed the date of Blee's later visit to Portland, and a further, personal, conversation with Blee as about two or three weeks after the second telephone call "in the year 1961 . . . in the early spring, right after they turned the water on for the irrigation season, which occurs around in April, early April . . . when the claims multiplied." (Tr. p. 456). Only then, almost a year after actual knowledge of the alleged peeling and flaking of the Shell coating did Beall indicate to Blee any intention on the part of Beall to look to Shell as responsible—that "something

was going to have to be done about them [i.e., the claims], and we would be forced to look to his company for damages." (Tr. p. 454).

The only other notice to Shell was in the form of a letter of demand dated July, 1962, from Beall's attorney to Shell just prior to commencement of this suit.

The only reason given by Wilkins for not giving any earlier indication to Blee or to Shell, of some intention of Beall to look to Shell as responsible for these failures was that "we did not know what caused the trouble." But Wilkins readily concedes that nearly a year previously, June, 1960, he had ascertained from his salesman in the territory *what the trouble was*; what the defect of the product was—"I learned what the problem was, yes, indeed. . . The dip was coming off of the inside of the pipe . . . in such a large volume that it was plugging the sprinklers, and the crops were not getting any water through the sprinklers." (Tr. p. 450).

This testimony was given at the trial on August 7th (See Tr. p. 450-456). In the following week, on August 12, 1964, plaintiff was permitted to recall Wilkins for some further testimony upon an entirely different subject. After the direct and cross examination on that day were completed, counsel for Beall informed the Court that Wilkins wished to make a correction in some of his previous testimony. Wilkins stated that, when he was on the stand a week before, he mentioned several telephone calls and that two of

them he related as having occurred in 1961. He then stated: "I have refreshed my memory. I have re-read my own deposition as well as that of Mr. Blee's [sic]. I wish to correct the fact that these calls were made in 1960 and not in 1961. One of them was in September and another one following thereafter—I have forgotten the exact period of time that had elapsed—but it was the next visit of Mr. Blee to Portland." Wilkins further testified that he kept no record of these calls or the time he made them (Tr. pp. 794-795).

This so-called correction made by the witness does not affect the substance of his testimony. In the first place it did not affect his previous testimony that the *first* telephone call he ever made to Blee was "in the latter part of 1960," as the witness had already testified on August 7th except to specify it to September 1960.

The next, or second telephone call to Blee, which the witness had previously testified was "in the spring of 1961 when the claims really started to come in terrific number" was made, according to his correction, in 1960, but he did not remember how long after the first call.

The previous testimony of Wilkins on August 7th remains to the effect that this visit of Blee to Portland was in April, 1961—a date fixed by reference to notable, easily remembered events. Further, even the placing of the second phone call somewhere in late 1960 would not affect the substance of Wilkin's testimony because his testimony of August 7th remains to

the effect that he never in *either* of these telephone calls, ever intimated to Blee in any way that he or Beall was looking to Shell as at fault or that Beall intended to look to Shell for damages. His previous testimony also remains to the effect that the *only* reference ever made to damage "or anything like that" was not during a telephone call, but only when Blee came to Portland (Read Tr. pp. 451-453).

In *Western Feed Company* v. *Heidloff*, 230 Or. 324, 370 P.2d 612, 622 (1962), the Court, applying ORS 75.490 and holding a claimed notice of breach of warranty to be insufficient as a matter of law, said:

> "Under our decisions the notice that is required is *one which expressly or by necessary implication advises the warrantor that damages will be sought.* Howard-Cooper Corp v. Umpqua Dredging & Construction Co., 148 Or. 582, 36 P.2d 590 (1934). It may be inferred from the evidence that the defendant complained to the plaintiff about the feed several times during the period that he continued to use it. These were general expressions of dissatisfaction, however, and not until July, 1959 was a notice given that can be construed to meet the statutory requirement." (emphasis added).

Holding further that a delay of four months from March, 1959, when the buyer became suspicious about the product, to July, 1959, when the buyer first sufficiently warned the seller to the effect that it looked to the seller as at fault and that damages would be

sought—was insufficient as a matter of law. The Court said:

> "The problem remains as to whether this notice was given within a 'reasonable time' after the buyer knew, or ought to have known of the breach. The question is sometimes one of law, sometimes one of fact. According to Williston (3 Williston, Sales, Sec. 484a):
>
> > 'Here, as in other cases, where a reasonable time must be determined, the question of what is a reasonable time in doubtful cases is for the jury to decide, but may be decided by the court if the facts permit but one conclusion.'
>
> "On the record before the Court we would have no hesitancy in deciding the issue against the defendant."

In *Howard-Cooper Corp.* v. *Umpqua Dredging & Construction Co.*, supra, the Court said:

> "The purpose of the statutory provision requiring such notice is clearly to give the seller timely information that the buyer proposes to look to him for damages for the breach; that the former may govern his conduct accordingly.
>
> * * * * *
>
> "The doctrine of the case of Jamrog v. H. L. Handy Co. (Mass.) 187 N.E. 540, also cited by defendant, which involved the purchase of turkeys, is that the notice required by the statute must refer to particular sales, must fairly advise the seller of the alleged defect, and specify with reasonable certainty in what the breach consists; that it need not necessarily take the form of an

express claim for damages or threat of such, but it is sufficient if it is reasonably inferable therefrom that the buyer is asserting a violation of his legal rights. In the case at bar, we think that the testimony as a whole fails to support any such inference.

"The fact that the seller has knowledge of the facts constituting the breach of contract does not render it unnecessary for the buyer to give the required notice. The notice required is not of the facts which the seller presumably knows quite as well as, if not better than the buyer, but of the buyer's claim that they will constitute a breach."

Under the evidlence in this case, considered in a light most favorable to plaintiff, it appears and must be held as a matter of law, that the buyer, Beall, knew or ought to have known (ORS 75.490) in June, 1960, of a breach of the asserted warranty.

The Beall firm had long experience as a pipe dipper and as a user of pipe coating. According to its President, John Beall, it had been from the beginning, not only aware, but specifically concerned—"worried"—about the causal relationship between a "right" pipe coating and possible "blistering or coming off" of the coating from smooth pipe (Tr. p. 181-182). That is precisely what occurred in June, 1960, after the switch to Shell coating for smooth pipe.

According to its Vice-President, Franklin Beall, it specifically relied in making this switch upon an asserted warranty by Shell salesman Blee that the Shell coating would work on smooth pipe. Beall knew it

was not working in June, 1960. It would be utterly unreasonable to infer in this case that Beall did not know—or that it should not have reasonably known of a possible breach of that warranty.

In the light of the evidence in this case, considered in a light most favorable to plaintiff, a delay of nearly a year after June, 1960, before giving to Shell some indication or notice of the kind required by Oregon law, is the view of this Court unreasonable as a matter of law.

The jury found (See Interrogatories, Tr. p. 2580, 2581) that defendant had breached a warranty to defendant and also found, responding to the Court's interrogatory, that plaintiff had used the product in a reasonable manner appropriate to its intended purpose —an issue which the Court submitted to the jury with instructions that the burden of proof of such issue was on the plaintiff (See Instructions at Tr. p. 2308; also see 2 California Jury Instructions, Civil [BAJI], Instruction No. 408-B and note, 1964 Pocket Part, p. 129).

For reasons herein set forth we are of the opinion that the jury's finding of breach of warranty is not supported by the evidence. Further, although the jury's finding that plaintiff used the product in a reasonable and appropriate manner was within the power of the jury and was *legally* consistent with the jury's other finding that plaintiff had been guilty of *contributory negligence*, we are of the opinion that this finding of reasonable, appropriate use of the

product is *factually* inconsistent with its finding of plaintiff's *contributory negligence.*

The defendant's allegations of contributory negligence on the part of the plaintiff, found by the jury to be true, were all directed to improper application of pipe coating to pipe by plaintiff in respect to care in obtaining a proper bonding of the coating to the pipe and, if true, would obviously constitute, as we have heretofore indicated, a proximate cause of any peeling or flaking from the pipe. However, the jury found, against the great weight of the evidence in our opinion, that plaintiff's contributory negligence was *not* a proximate cause of the peeling or flaking.

For the same reasons we believe that the jury's finding of reasonable and appropriate use of the product—a finding that involved factors virtually the same as in contributory negligence—is, not only *factually* inconsistent with the contributory negligence finding, but also so contrary to the weight of the evidence that a new trial should be granted in any event.

The verdict of a jury should not be lightly reversed nor should a new trial be lightly granted, certainly not for the mere reason that the Court may disagree with the verdict. However, in this case the Court has confirmed its original belief that this verdict for plaintiff, if allowed to stand, would be extremely unfair to defendant, would be a legally unjustified windfall to the plaintiff, and would be, in the opinion of the Court, a miscarriage of justice.

In fairness to the jury, the Court notes the length

of the trial, the technical, complicated subjects involved, and the often disorderly and imprecise, and sometimes bewildering manner in which the evidence was presented. But the law contemplates that in these circumstances the Court has a responsibility to act in accordance with its considered evaluation of the record.

Defendant may prepare and present an appropriate formal written order conforming to the views expressed at page 6 hereof.

Dated: January 18th, 1965.

WM. T. SWIEGERT
United States District Judge

A TRUE COPY

KEITH BURNS,
Clerk

O BISHOP
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

BEALL PIPE & TANK CORPORATION, a corporation,
Appellant,
vs.
SHELL OIL COMPANY, a corporation,
Appellee.
No. 20,033

[January 4, 1967]

On Appeal from the United States District Court for the District of Oregon

Before. MERRILL, BROWNING and DUNIWAY, Circuit Judges

MERRILL, Circuit Judge:

With jurisdiction grounded upon diversity of citizenship, appellant (Beall) has brought suit against appellee (Shell) for damages resulting from alleged product defect. Jury trial resulted in a verdict for Beall. Challenging the sufficiency of the evidence to support the verdict. Shell then moved for new trial and for judgment *non obstante veredicto.* The District Court granted both motions and entered judgment for Shell;[1] this appeal followed. We affirm.

The product involved is Shell Culvert Coating Compound, an asphalt product.

---

[1] F. R. Civ. P. 50(c)(1).

Beall is a manufacturer of tanks, pipes and trailers, with plants in various western states. Among its pipe products are culvert pipe, a corrugated, galvanized product used for conveyance of water under roadways, and "smooth" pipe, an ordinary steel product used for carrying water under pressure in domestic water and irrigation systems. This lawsuit concerns the latter.

The processing of pipe involves dipping it in hot asphalt to achieve a protective coating of the metal surface. Beall's Portland, Oregon, plant was dipping both culvert and smooth pipe. Culvert pipe was dipped in a horizontal vat, while smooth pipe, since 1924, has been dipped in a 53-foot vertical vat. Originally the vertical vat accommodated a pipe production of 300 to 500 feet per shift. Improved production mills were installed and by 1959 Beall had a pipe-making capacity of 30,000 feet per shift—a sixty-fold increase in demand upon the vat.

The adhesion of asphalt to metal is accomplished when both asphalt and metal are heated to a temperature at which the asphalt is a fluid of low viscosity and "wetting" of the surface by the asphalt occurs, permitting a molecular adhesion to the metal surface. If the temperature in the vat is too low the viscosity of the asphalt increases, and the ability to wet varies inversely with viscosity. If the asphalt is hot enough but the metal is not, the asphalt will chill at contact and will not wet the surface properly. On the other hand, prolonged overheating of asphalt will cause it

to deteriorate and result in an inferior coating. Temperature control is thus essential if adhesion failure is to be avoided.

The Shell product was developed for use in the culvert or drainpipe field, where specifications are fixed by highway departments or other governmental agencies on the basis of performance experience. The Shell asphalt base produced in Venezuela was shipped to the United States where it was processed by the Trumbull Asphalt Co. to meet culvert specifications established by Armco, a large processor. It met the standards of the Oregon Highway Department.

For over thirty years, until 1959, the asphalt used by Beall had been the product of the Witco Chemical Company. In July, 1959, Beall commenced use of Shell's product in its horizontal vat for culvert coating. Three months later it started to use the Shell product in coating its smooth pipe in the vertical vat.

Commencing in April 1960, Beall received complaints respecting its smooth pipe. Farmers were discovering that the asphalt was disengaging from the inside of the pipe and clogging their irrigation sprinklers. By late August, complaints had grown so numerous that Beall ceased using Shell asphalt and reverted to Witco. Beall also received some complaints respecting Witco-dipped pipe processed before switching to Shell. After shifting back to Witco it continued receiving complaints. In 1963 Witco refused to sell further to Beall without an express disclaimer.

The main issue in the case is as to the cause for

the asphalt's failure to adhere. Beall contends that Shell's asphalt was defective. In its complaint it charges that Shell "was negligent, careless and reckless in its manufacture and preparation of the coating compound," and that there was a breach of an express warranty or of an implied warranty of fitness. Shell's position, in defense, is that Beall misused a good asphalt; that with the drastic increase in production it relaxed temperature control in the vertical vat and was either dipping cold pipe, or cracking the asphalt by overheating.

The judge and the jury disagreed as to how this basic issue should be resolved upon the record. The jury held for Beall. The court then ruled that "the evidence is so insufficient to support the verdict and the verdict so contrary to the weight of the evidence" that a new trial was required. Upon a study of the record we fully agree.

The District Court went further, however; it held on other grounds as a matter of law that both the negligence and warranty claims must fail. A study of the record convinces us that insufficiency of the evidence is such as to support judgment n.o.v. as well as new trial.

Shell established without dispute that the custom in the industry is to rate asphalt according to physical properties such as hardness, flashpoint, melting point and viscosity; that Shell asphalt met rigid tests for these properties established by the Armco Company and by various state highway departments, including Oregon's.

Shell's strong case in this respect and its impressive proof of changes in Beall's production methods and relaxed attention to temperature control overwhelmed any inferential weight which Beall might claim to attach to the fact of adhesion failure standing alone, as to either the negligence or the warranty claim. The burden was thus cast upon Beall to make a factual showing both of breach (of duty of care, or of warranty) and of causation.

We may assume arguendo that a sufficient case for the jury was made as to breach of duty of care; that Beall had, as to negligence presented testimony as to a standard of manufacturing performance which Shell had failed to meet. We may further assume that as to warranty Beall had fixed on a product defect upon which breach of warranty might be mounted.[2]

---

[2] This assumption strains to read the record in favor of Beall. The testimony of its two expert witnesses is crowded with inconsistency to a point verging on incredibility. Indeed, their theory of defect appears to be disputed by the very facts advanced to support it.

Their testimony was based not on the results of tests of physical properties, but on a partial chemical analysis, separating asphalt by solvents fractionation into general groups of chemical compounds having similar properties. Both men admitted the novelty of their theories, and that an exact chemical analysis of a substance as complex as asphalt is not feasible.

Reading the testimony of the two experts together, the three relevant chemical groups were: (1) asphaltenes—high molecular weight hydrocarbons which exist as solids dissolved in the other components; (2) reactive components; (3) unreactive oils, mostly paraffins. Reactive components, with age, may change into asphaltenes. The higher the percentage of asphaltenes, the harder the asphalt.

Both witnesses analyzed Shell asphalt for its stability over time. Both agreed that the higher the ratio of reactive components to others, the more unstable the asphalt, and the

In our judgment, however, there is no evidence whatsoever from which the jury might rationally have concluded that such product defect was the cause of the aspsalt's failure to adhere.[3]

---

higher the probability that it would deteriorate in quality with the passage of time, the reactive components changing into asphaltenes and hardening the asphalt into a brittle coating, which would flake or crack and break off. One Witness compared Shell with Witco and concluded that Shell contained a substantially higher ratio of reactive components and was thus inferior.

The tests conducted by the other witness, however, appear to destroy the probative value of this conclusion. His tests were made on samples of used pipe. Most were on pipe that had proved defective, but some were from sound pipe. An examination of his data shows that the best results in what he designated as "aging ratio" (reactives to others) was achieved by a sample of defective pipe coated with Shell, while one of the worst was shown by pipe coated with Witco, which he admitted he had assumed was a good product. Further, the samples from defective pipe show aging ratios comparable to the figures for sound pipe, the Shell and Witco figures were generally comparable, and the figures do not appear to establish any consistent pattern.

A second theory of defect was advanced by this witness. He asserted that an excessive amount of paraffins would cause the asphalt to ooze liquid oils at the point of contact with the pipe and result in the coating peeling off. Lack of consistency in the samples tested robs this theory of any supporting proof upon the question of what the standard should be. For example, of thirty Shell samples tested the one second lowest in oils (8.1%) failed five months after purchase, while the one highest (36.1%) failed fifteen months after the purchase, and the one second highest (33.6%) failed twenty-four months after purchase.

Further, the other witness who tested only fresh asphalt showed as the result of his analysis that Witco's percentage of oils was 42% as compared to Shell's 29%. If Witco be the accepted standard, Shell more than met it in this respect.

It is also significant that neither expert was knowledgeable in pipe dipping processes, nor had either analyzed heated vat asphalt, in the form applied to the pipe.

[3] In its memorandum opinion the District Court noted that "* * * [N]either expert could explain why, * * * if chemical change of asphalt occurs only with 'time,' some of the

Conclusive, in our view, is the fact that Witco asphalt (which for many years had served Beall successfully), was the standard to which the expert testimony was keyed. The conclusion of one of the witnesses that Shell was defective was based on Shell's failure to meet the witnesses' standards of stability over time in which respect Witco was assumed to be satisfactory. Comparing Shell with Witco, the other witness concluded that Shell was defective in that it possessed a substantially higher percentage of reactive components, making for instability. This, then, was the measure of Shell's alleged breach—departure from the Witco standard.

The fact that during the critical period Witco also failed to adhere demonstrates that lack of Witco quality in any respect was not the cause of Shell's adhesion failure. Even without the alleged breach, failure would still have resulted.

Judgment affirmed.

---

failures asserted by Beall were discovered within a period of a few weeks after the dipping of the pipe." Further, it noted, "Nor is there any evidence; expert or otherwise, to explain why, if the Beall smooth pipe failures were due to the comparatively poor aging quality of the Shell product, the same kind of smooth pipe coating failure occurred during about the same period on pipe dipped with Witco PMR coatings—a standard coating which Beall claims it had been using successfully on such pipe for many years up to mid-1959—except only the suggestion by Beall that the Witco coating must also suddenly have developed a similar poor aging quality."

APPENDIX D

I

Assertion that Dr. Traxler and Dr. Marian said or found the Shell asphalt as the best.

On page 105 of Shell's brief it is stated, ". . . plaintiff's own witnesses failed to show anything wrong with the Shell asphalt. Traxler said it was the best; Marian found it the best, . . ." This same theme is repeated on pages 12, 13, 75, 77 and 78 of Shell's brief.

The record is devoid of any statement by either Dr. Traxler or Dr. Marian that the Shell asphalt was the best.

Their testimony is exactly the opposite. Dr. Traxler testified as follows:

> "Q. Now, looking at those three asphalts and the coefficient that you have derived there, which one in your opinion would be the most stable or durable asphalt?
>
> A. Well, it would be the 1150 P, although this, that number is pretty close to .44. I would say that Witco and 1150 P would be pretty close together. Those numbers are not far apart.
>
> Q. Then the Shell material which is 1.17 would be the least durable, then?
>
> A. That would be my conclusion, yes, sir." (Tr. 1389).

The foregoing testimony is diametrically opposed to the claim made by Shell in its brief. As Dr. Traxler stated, "Well, my opinion is that the major cause of the lack of adhesion by the Shell asphalt is the compo-

sition of the asphalt as compared to others. . . ." (Tr. 1474). Dr. Marian's numerous tests and analyses show the faulty chemical composiiton of the Shell asphalt and his conclusion was the same as Dr. Traxler's. We are unable to comprehend how it can honestly be claimed that Dr. Traxler and Dr. Marian claimed that the Shell asphalt was the best.

Notwithstanding the foregoing, Shell's counsel contended that Dr. Traxler so testified on four separate occasions in the arguments before the trial judge pursuant to the defendant's motion for judgment n.o.v. (n.o.v. Tr. 15, 27, 191 and 219).[2] As shown above, Dr. Traxler did not so testify. This deliberate disregard of the true state of the evidence demonstrates the technique used. The trial judge was apparently influenced by the constant repetition of this type of assertion.

II

Assertion that Dr. Marian was unable to produce one single failure of adhesion in two and a half years of testing.

This assertion simply is not true. It appears at two places in Shell's answering brief (pp. 7-9, 79-80). The same assertion was made on six different occasions by Shell's attorney during the argument pursuant to the motion for judgment n.o.v. (n.o.v. Tr. 12, 13, 25, 35, 184, 185). Unfortunately, the trial

[2] Transcript of hearing on motion for judgment n.o.v. and in the alternative for a new trial, for purposes of brevity, will hereinafter be designated as (n.o.v. Tr. ——) giving the appropriate page reference.

judge repeated this assertion in his memorandum opinion and adopted it as his finding of fact (App. A, pp. 95, 98).

Shell apparently bases this assertion upon Dr. Marian's testimony appearing on pages 2151 and 2152 of the transcript:

> "Q. Isn't it a fact that in two-and-a-half years of testing, you have yet to get the Shell or the Witco asphalt *to peel off* these plates?
>
> A. Well, these samples are only ten months plus what it was; they were not two-and-a-half years." (Emphasis supplied)

Dr. Marian had in the earlier part of his testimony explained the adhesion failure demonstrated by his tests in the following testimony:

> "Q. In your opinion, is there any failure of the bond of the asphalt to those steel plates?
>
> A. Well, they are cracked and on some places the edges are loose."
>
> * * * * *
>
> "Q. Well, in your opinion, does that, from what you can observe, constitute a failure?
>
> A. Definitely so.
>
> Q. When did that first manifest itself, or when did you first observe that?
>
> A. After ten months in treatment after this cycling in water and drying." (Tr. 826).

On cross-examination Dr. Marian further testified:

> "Q. . . . Doctor, I ask you to take my little knife and pick the worst spot you can find on that asphalt and scrape it, see if it comes off.

A. I admit that the adhesion has not failed in this case. May I explain that these plates are under very mild conditions in the laboratory, treated under very mild conditions, under uniform temperature, and not exposed to the severe conditions which you meet in practice, and the fact that it has not failed up to now, these plates are treated ten months, is not an indication that they never will fail; nevertheless, *the surface is cracked, as an indication that the material is deteriorated.*" (Emphasis supplied).

"Q. Now, Doctor, as a matter of fact, the cracking on that surface does not indicate that it will fail at any particular time, does it?

A. It does; definitely so." (Tr. 2082)

Then Dr. Marian stated: "Well, I would say that adhesion failure at the edges is a sign of deterioration and worsening of the adhesive condition." (Tr. 2084).

Dr. Traxler confirmed Dr. Marian's findings as follows:

"Q. Now would you look at the . . . Exhibits 1 and 3, and see whether or not you can see any indication of aging or deterioration on either of those samples, such as cracking. . . .

A. This is number 3.

Q. Would you look on both sides of each exhibit?

A. Well, yes, there is evidence of incipient aging by the type of crazing or alligatoring as it is sometimes called. . . ."

* * * * * *

"Q. That is just the early stages?

A. Yes; that is the early stages, and as the

weatherometer test went on and on and on they would become more exaggerated." (Tr. 1434 to 1435).

It is apparent from the foregoing testimony that the trial court was misled by Shell into believing that there had been no failures after two and a half years of testing. This further demonstrates the false premise upon which the trial court acted in granting Shell's motion.

III

Assertion that 20% of the Shell dipped pipe failed and that 20% of the Witco pipe also failed.

It was repeatedly asserted by Shell that 20% of the Shell dipped pipe and that 20% of the Witco dipped pipe failed. This assertion was made on several different occasions during the argument on the motion for a new trial (n.o.v. Tr. 8, 20, 48, 49, 55, 60 and 192). The same assertion was made in Shell's answering brief on eleven different occasions (pp. 4, 17, 24, 28, 38, 39, 65-66, 77, 89, 91, 98 and 106). The trial court adopted this version of the evidence and on three separate occasions in its memorandum opinion found that the Shell dip failed "just as" did the dip on the Witco pipe. (App. A, 106, 107, 109). These assertions by Shell and the court's use of them in its memorandum opinion represent a misconstruction of the evidence. The record shows that the total production of Shell dipped pipe was 1,329,204 feet (Tr. 1195); 311,764 feet resulted in claims (Tr. 1196). Therefore 23.4% of the Shell dipped pipe failed in service.

The total production of pipe dipped in Witco asphalt was 6,297,066 feet (Tr. 1879). Of this amount 579,230 feet resulted in claims. The percentage of Witco failures is 9.1%. Therefore, the evidence is clear that the percentage of failures of pipe dipped with Shell asphalt was more than double that of the pipe dipped with the Witco material.

The fact that there were failures of both Shell coated pipe and Witco coated pipe regardless of the percentages does not *in and of itself* have any probative value as to whether such failures were caused by faulty chemical composition or improper application. It proves neither. There must be some supporting evidence explaining why the failure occurred whether the percentage of failure is 1% or 100%. There is substantial evidence that the quality of the asphalt and its performance, such as adhesion, will vary depending upon its chemical composition which would explain both the Shell and Witco failures. Both Dr. Marian and Dr. Traxler explained how the chemical composition of both the Witco material and the Shell material was faulty and explained how this affected or caused adhesion failures. In discussing the matter of durability and aging, Dr. Traxler said in part, ". . . it would vary with different asphalts, different sources, different composition. The stability of the asphalt would vary and the rapidity with which resins and cyclics converted into asphaltenes would vary considerably." (Tr. 1419).

Shell's own witness Bramble testified:

"Q. All right. Then you would agree that the

chemical composition of asphalt for dipping pipe is important; is that right?

A. Well, sure.

Q. All right. And depending upon what these component parts are of the asphalt, you will get different types of performance, won't you?

A. Exactly." (Tr. 936-937).

* * * * *

"Q. I believe you also said, Mr. Bramble, that the California crudes didn't produce a stable or a good type of asphalt coating material; is that right?

A. That's right.

Q. Isn't it a fact that the reason that it doesn't is because of what this chemical composition is; it's a different kind of asphalt.

A. Well, this could well be, certainly." (Tr. 939).

* * * * *

"Q. All right, so when you get down to the fooling around with blends or mixing blends with the straight-run material, it gets back to a chemical composition problem, doesn't it?

A. Yes, sir.

Q. All right. Now, isn't it a fact that these asphalts vary from oil field to oil field - - - that is, the type of asphalt you get from your crudes?

A. Yes, they vary from crude to crude." (Tr. 965).

The Trumbull still reports (Plaintiff's Ex. 14A1-79) show that different formulations or mixtures and different processing was performed on every batch of material sold to Beall. Also, as Lindquist wrote in

part, ". . . we would probably eliminate the peeling condition by using a harder enamel made from a combination of 2/3 CCF, plus 1/3 of 86 Oil to the approximately same melting point as Witco showed. I feel that by making a harder, tougher material, that we would get better adhesion and less tendency for the material to peel from the pipe. . . ." (Tr. 571, Plaintiff's Ex. 9A-6).

The evidence discloses that Witco did in fact change its sources and formulations many times since approximately 1957. Loren M. Fowler, Chief Chemist for Witco, was deposed and his deposition was summarized by stipulation of the parties as follows:

> "He testified that they have changed their sources of material for their base flux, and also what they call a plasticiser or the material that they mix with their base material on several occasions since about 1956, '57, and the ratio of mixing these materials.
>
> "Now, this has varied from, say, 94 percent and 6 percent to 55 percent and 45 percent; that it would be 55 percent asphalt and 45 percent plasticiser. It's also, at times, * * * 25 to 30 percent plasticiser. It's also, at times, * * * 25 to 30 percent plas—has occurred, I say from the period of 1957, 58 on to the present time. They also have used the following suppliers for these various formulations: The Champlin, Kerr-McGee, the Champlin Oil Company, the Ohio Oil Company; the Texas Oil Company and the Pure Oil Company, and the Rife Petroleum Company . . ." (Tr. 2229).

As shown from the above, the court was misled as to the true state of the evidence.

IV

Assertion that neither Beall's experts nor any evidence in the case suggested that Shell's asphalt failed to adhere to the culvert pipes.

This statement appears at page 73 of Shell's answering brief and is simply not true. Beall's opening brief (pp. 54-56) set forth the unequivocal testimony that there were culvert failures. This is shown in plaintiff's exhibits 50 to 50F. The trial judge, however, adopted the Shell version of the testimony as a proven fact (App. A, p. 87). The court did this in the face of evidence squarely to the contrary. Surely this must demonstrate how the trial court was misled.

V

Assertion that Beall knew of substantial asphalt failures from its Witco dipped pipe in September, 1959.

This is a distorted version of the evidence. Berger actually testified that Franklin Beall told him that, ". . . they (Beall) had been having difficulty with our coating on the last seven out of the last eight major jobs . . ." (Tr. 1215). The court in its opinion paraphrasing this testimony incorrectly as ". . . seven or eight major failures of Witco . . ." (Appellant's App. A, pp. 106-107). The testimony was incorrectly quoted to the court by Shell's attorneys in the arguments during the motion for judgment (n.o.v. Tr. 39) and incorrectly recited three different ways in Shell's

answering brief (pp. 17, 28, 38). Surely the evidence must govern the outcome of the case and not distorted versions thereof.

Franklin Beall summed up the entire matter concerning the alleged failures of Witco as follows: "We had a minor claim out in West Texas that we do not know, or did not know then or do not know now, whether it was our pipe. The contractor had three different brands of pipe. He put his line in. It was a very light wall pipe, and the welders—it was a welded line, and the welders that put it in were regular oil field welders who were accustomed to welding on heavy wall pipe and, in turn, burned some of the dipping off inside of the pipe. The whole claim, I think, was three hundred and some dollars, a hundred and some dollars to dig it up and examine it, and that was all there was to it." (Tr. 294-295).

MAY 1 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

Case No. 1219

BEALL PIPE AND TANK CORPORATION, a corporation,

Petitioner,

v.

SHELL OIL COMPANY, a corporation,

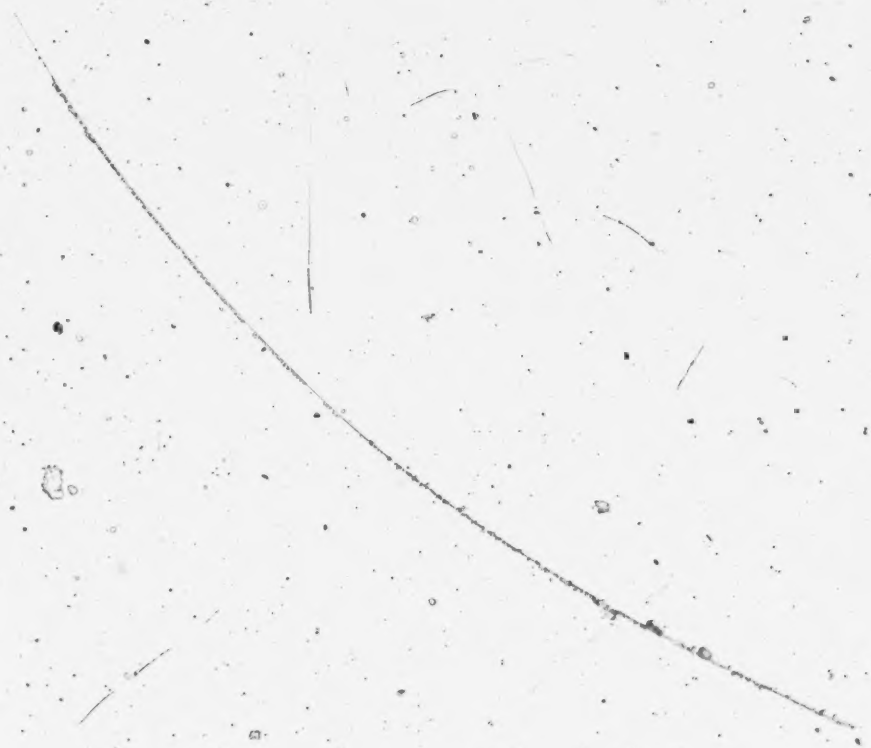
Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARDEN E. SHENKER
801 Standard Plaza
Portland, Oregon 97204
Attorney for Respondent

LAMAR TOOZE JR.
801 Standard Plaza
Portland, Oregon 97204
Of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-67



SUBJECT INDEX

	Page
Statement of the Case	1
Summary of Argument	3
Reasons for Not Granting Writ	5
Introductory Comment	5
I. A. No Important Federal Question to Warrant Certiorari	7
B. Burden of Proof Rules Not Involved in Basis for Decisions Below	24
C. No Conflict Among the Circuits on the Rules Involved in this Case	25
D. No Uncertainty on the Scope of *Erie* Applied to this Case	28
II. No Conflict with the Rules Affecting a Motion for a New Trial as Applied to this Case	29
Conclusion	31

CITATIONS

Table of Cases

Page

Alpha S. S. Corporation v. *Cain*, 281 U.S. 642, 50 S. Ct. 433, 74 L. Ed. 1086 (1930) 6

Barnard v. *United States*, 342 F.2d 309, 326 (9th Cir., 1965) 26

Berenyi v. *District Director*, 384 U.S. 903, 87 S. Ct. 666, 670, 16 L. Ed. 2d 357 (1967) 7

Byrd v. *Blueridge World Electric Cooperative*, 356 U.S. 525, 529, 530, 78 S. Ct. 893, 897, 2 L. Ed. 2d 953 (1958) 6

Carlson v. *Wheeler-Hallock Co.*, 171 Or. 349, 355, 137 P.2d 1001 (1943) 11

Commercial Standard Insurance Company v. *Feaster*, 259 F.2d 210, 212 (10th Cir. 1958) 10

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1938) 11, 12

Davis v. *Firestone Tire & Rubber Company*, 196 F. Supp. 407, 411-412 (N.D. Cal., 1961) 9

Dick v. *New York Life Insurance Company*, 359 U.S. 437, 454, 461, 79 S. Ct. 921, 931, 935, 3 L. Ed. 2d 935 (1959) 6

Erie Railroad v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 4, 5, 27, 28, 31

Fish v. *Southern Pacific Company*, 173 Or. 294, 301, 143 P.2d 917, 920, 145 P.2d 991 (1944) 8, 10

Ford Motor Company v. *J. M. McDavid*, 259 F.2d 261, 266 (4th Cir., 1959); cert. den. 358 U.S. 908, 79 S. Ct. 234, 3 L. Ed. 2d 229 (1958) 10

Galloway v. *United States*, 319 U.S. 372, 395, 63 S. Ct. 1077, 1089, 87 L. Ed. 1458 (1943) 9, 10, 11

Gunning v. *Cooley*, 81 U.S. 90, 93, 50 S. Ct. 231, 233, 74 L. Ed. 720 (1930) 9, 10, 28

Hawley v. *Alaska Steam Ship Co.*, 236 F.2d 307, 309 (9th Cir., 1956) 9

Henzel et al v. *Cameron et al*, 228 Or. 452, 464, 365 P.2d 498 (1961) 12

CITATIONS (Cont.)

Page

Johnson v. *Flemming*, 188 F. Supp. 447, 449 (D. Or. 1960) 12

Johnson v. *Hoffman, et al*, 132 Or. 46, 59, 284 P. 567 (1930) 10

Lind v. *Schenley Industries, Inc.*, 278 F.2d 79, 92 (3rd Cir., 1960); cert. den., 364 U.S. 935, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960) 26, 29, 30

Lovas v. *General Motors Corp.*, 212 F.2d 805, 807 (6th Cir., 1954) 10, 27

Magee v. *General Motors Corp.*, 213 F.2d 899, 900 (3rd Cir., 1954) 30

Moist-Cold Refrigerator Co. Inc. v. *Lou Johnson Co., Inc.*, et al, 249 F.2d 246 (9th Cir. 1957), cert. den. 356 U.S. 968, 78 S. Ct. 1008, 2 L. Ed. 2d 1074 (1958) 26, 30

Moore v. *Chesapeake & O. Ry. Co.*, 340 U.S. 573, 578, 71 S. Ct. 428, 430, 95 L. Ed. 547 (1951) 9, 10, 28

Phillips v. *Colfax Company, Inc.*, 195 Or. 285, 292, 243 P.2d 276, 245 P.2d 898 (1952) 9

Reece et al v. *Capital Transit Company*, 230 F.2d 824 (D.C. Cir., 1956) 10

Rossman v. *Forman*, 24 Or. 610, 611, 356 P.2d 430 (1960) 10

Spain v. *Oregon-Washington R & N Co.*, 78 Or. 355, 369, 153 P. 470, 475 (1915) 9

The Lindseed King, 285 U.S. 502, 52 S. Ct. 450, 76 L. Ed. 903 (1932) 6

Union Pacific Railroad Co. v. *Munoz*, 326 F.2d 248 (9th Cir., 1964) 11, 12

Statutes

ORS 17.610 (6) 29

Rule 50 (b), Federal Rules of Civil Procedure 27, 28

Texts - Treatises

6A Moore's, *Federal Practice*, ¶59.04 [1], pp. 3711-3712 ..... 30, 31

6A Moore's, *Federal Practice*, ¶59.08 [5], p. 3816, Note 11 30

In the Supreme Court of the United States

OCTOBER TERM, 1966

Case No. 1219

BEALL PIPE AND TANK CORPORATION, a corporation,

Petitioner,

v.

SHELL OIL COMPANY, a corporation,

Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

The Statement of the Case by petitioner omits several important elements:

1. Petitioner says (Petition, p. 3) that "for all practical purposes, plaintiff's production methods have not been changed in the past 30 years." This is false in detail. Without contradiction it was proved that Beall originally set up a vat, for dipping smooth pipe in asphalt, in 1924. At that time, and until 1952,

Beall had a capacity for making smooth pipe at the rate of 300-500 feet per shift. Between 1952 and 1959 (when the detachment of asphalt began to occur), Beall increased its pipe-making capacity by a factor of 60-100. Beall had a capacity by 1958 of 30,000 feet per shift. It produced and dipped pipe "to order," and in the late 1950's the asphalt-dipping department got 2-3 weeks behind the orders. The pipe-making capacity tripled in 1958. Beall never enhanced or improved its vat for dipping pipe. It always used the 1924 model of dipping vat. There was veritable demonstrative evidence that this huge increase in pipe production overwhelmed the dipping facilities, which were the bottleneck in the flow of production (Tr. 219-220, 333, 1195, 1931-1932).

Moreover, in a process that requires close thermal control, Beall's temperature control in the all-important "preheat oven" broke and was not repaired, and the whole practice of the pipe-dipping department similarly broke down. These matters are covered in Appellee's Brief to the Court of Appeals (pp. 14-24).[1] As noted there, Beall abandoned its original, successful, formal procedures in the torrent of pipe production and permitted the control of the entire dipping operation to degenerate to the random practices of untrained individual operators.

2. Petitioner says (Petition, p. 4) that it "notified defendant of the disbonding problem," which is a part of the notice requirement for a claim of breach

[1] Hereinafter referred to as Appellee's Brief.

of warranty under the Uniform Sales Act applicable to this case. The notification was too late and proof of the notice was insufficient, as a matter of law. See Appellee's Brief, p. 49, and see discussion of this point by the District Court below, at Petition, App. B, pp. 49-56.

3. Petitioner claims (Petition, p. 4) that it "contended and offered proof that the disbonding failures resulted from an imbalance of the chemical composition of the asphalt . . . purchased from defendant. . . ." This claim will be discussed below. Suffice it to say here that there was a total failure of proof on this subject.

SUMMARY OF ARGUMENT

1. There is no real "Federal question" apparent in the record, or in the result of the actions of the courts below. The "Federal question" asserted by the Petitioner is essentially a request that this Court reverse the lower courts upon a re-appraisal of the evidence, not on any genuine legal issue.
2. Petitioner ostensibly frames the "Federal question" in this manner:
   (a) The grounds for a judgment n.o.v. (i.e., whether there is any "substantial evidence" to support the verdict) are more strictly applied by the Oregon state courts than they were by the federal courts below.
   (b) Because of this difference in strictness, the

federal courts below must have been applying some covert "Federal standard" at variance with the alleged "state standards"; hence the "Federal standard" violates the precepts of *Erie* v. *Tompkins*.

(c) This disease infects several of the Circuits, while other Circuits follow the "state standards" for granting judgments n.o.v.

3. The federal courts below, in fact and in explicit terms, applied exactly the same standards to the substantiality of petitioner's evidence, in granting a judgment n.o.v., as the standards announced and applied by the state courts of Oregon. Moreover, this same "standard" of sufficiency is apparently the uniform model applied by substantially all other state and federal courts, regardless of what adjectives are used to describe the process.

4. The Petition contains nothing more than the claim that the lower courts gave insufficient credit to petitioner's evidence, not that they applied the wrong standard. This Court should not entertain jurisdiction for the sole purpose of reviewing the nuances of evidence.

5. In order to show that the courts below must have applied a loose, "federal" standard to the sufficiency of petitioner's evidence, and granted a judgment n.o.v. to respondent simply because they disagreed with the verdict, the Petition contains the following errors:

(a) The record of evidence is misread.

(b) The statements of the courts below are obviously misinterpreted.

(c) Statements relating to the granting of a new trial are transposed into statements relating to the stiffer matter of granting a judgment n.o.v.

6. Petitioner asserts an identity between the burden of proof and the sufficiency of evidence on a motion for judgment n.o.v. This claim is without support in authority or logic.

7. In attacking the alternative orders of the District Court below—the granting of a new trial—petitioner erroneously claims that there is a conflict among the Circuits, involving the doctrine of *Erie* v. *Tompkins*. This claim is totally without support.

REASONS FOR NOT GRANTING THE WRIT

Introductory comment

The opinion of the Court of Appeals below was based upon the factual paucity of petitioner's case. In effect, the Court of Appeals was satisfied that the law required no further analysis. And, indeed, where the issue is a judgment n.o.v. or a new trial, as in our case, the inquiry must be basically factual. (See Petition, App. C, p. 62). The solitary question is whether there is substantial apposite evidence to support the verdict.

An examination of the facts alone convinced the

Court of Appeals that the District Court was correct in rendering judgment for the respondent, Shell. If the decision of the Court of Appeals or the District Court is valid either on the law or the facts, this Court should not re-examine the decisions below. See *Alpha S.S. Corporation* v. *Cain*, 281 U.S. 642, 50 S. Ct. 443, 74 L. Ed. 1086 (1930). This Court traditionally has accepted the interpretation of the facts and the law rendered in the concurrent decisions of two lower courts. *The Lindseed King*, 285 U.S. 502, 52 S. Ct. 450, 76 L. Ed. 903 (1932). The substantive legal questions in our case, which the Court of Appeals found unnecessary to analyze, were of local law in the main, and on such questions this court ordinarily accepts the decisions of the lower courts. *Byrd* v. *Blueridge World Electric Cooperative*, 356 U.S. 525, 529-530, 78 S. Ct. 893, 897, 2 L. Ed. 2d 953 (1958).

Our case presents no extraordinary legal issues. The issue presented to the District Court, and to the Court of Appeals, was the sufficiency of the evidence advanced at trial. That issue should not be reviewed in the United States Supreme Court. It was the staple business of Courts of Appeals. The district judge undertook the great chore of reviewing the evidence, and he found it insufficient to make out a case for the plaintiff. The Court of Appeals repeated the same function and made the same finding. This court has said that it does not have that function nor that aptitude. *Dick* v. *New York Life Insurance Company*, 359 U.S. 437, 454, 461; 79 S. Ct. 921, 931, 935, 3 L. Ed. 2d 935 (1959).

Petitioner concedes that there is no federal constitutional question involved in our case. The questions are factual, as the Petition illustrates. This court most recently has held that unless a constitutional question is involved the decisions of both the district court and a court of appeals, agreeing upon the result, will not be reviewed, for "this court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues." *Berenyi* v. *District Director*, 384 U.S. 903, 87 S. Ct. 666, 670, 16 L. Ed. 2d 357 (1967).

I

A. No important question of federal law was decided by either of the courts below, and no question of federal law remains unsettled by this court, as applied to this case.

Although petitioner asserts that the Supreme Court of the State of Oregon has formulated strict standards for granting or denying motions for a judgment notwithstanding the verdict, and although petitioner obliquely asserts, without any reference to authority, that federal courts have formulated loose standards for granting or denying motions for judgment n.o.v., in fact the Oregon standards applicable to this case are the same as the test employed by the courts below.

Petitioner claims that the "court below has implicitly, if not explicitly, held that a federal standard applies," in determining whether the plaintiff's evi-

dence is sufficient to escape a judgment n.o.v. (Petition, p. 5). This assertion is wholly untenable. The District Court, in its opinion explicitly states the standard employed:

> "The Court is mindful that the test for the propriety of judgment notwithstanding the verdict is whether in this case, disregarding conflicting evidence in favor of the defendant and giving to plaintiff's evidence all the value to which it is reasonably entitled, therein indulging in every reasonable inference favorable to plaintiff, there is evidence of sufficient substantiality and probative value to support the verdict in favor of plaintiff." (Petition, App. B, p. 22).

The opinion is studded with repeated references to the absence of "substantial evidence" or "any" evidence.

Compare this test with the statement of the "Oregon standard" contained in the quotation from *Fish* v. *Southern Pacific Co.* on page 6 of the Petition. No lawyer, however hard pressed for inspiration, could discern even a shade of real difference between the "Oregon" rule and the standard applied by the District Court below.

Perhaps Petitioner is claiming that the Court of Appeals applied some "Federal" standard at odds with the "Oregon" standard. Not so. The Court of Appeals merely agreed with the District Court: "A study of the record convinces us that insufficiency of the evidence is such as to support judgment n.o.v. as well as new trial." (Petition, App. C, p. 62.)

The Oregon Supreme Court applies the rule that if any essential material issue is not supported by competent evidence, then a directed verdict or a subsequent judgment n.o.v. must be granted. *Phillips* v. *Colfax Company, Inc.*, 195 Or. 285, 292, 243 P.2d 276, 245 P.2d 898 (1952). The federal courts apply exactly the same rule: If there is a lack of evidence to prove any necessary element of the plaintiff's case a verdict should be directed against the plaintiff. *Hawley* v. *Alaska Steam Ship Co.*, 236 F.2d 307, 309 (9th Cir., 1956). The standards of the Oregon court and the standards of the federal courts agree that if a plaintiff's recovery at best relies upon one of several possible causes of harm to the plaintiff, then a verdict must be directed against that plaintiff. *Spain* v. *Oregon-Washington R & N Co.*, 78 Or. 355, 369, 153 P. 470, 475 (1915); *Davis* v. *Firestone Tire & Rubber Company*, 196 F. Supp. 407, 411-412 (N.D. Cal., 1961). This court agrees: *Galloway* v. *United States*, 319 U.S. 372, 395, 63 S. Ct. 1077, 1089, 87 L. Ed. 1458 (1943); *Moore* v. *Chesapeake & O. Ry. Co.*, 340 U.S. 573, 578, 71 S. Ct. 428, 430, 95 L. Ed. 547 (1951). Phrased otherwise by this court, if evidence is consistent either with a hypothesis of liability or one of non-liability, the proof has established neither. Evidence relating to any crucial issue of fact must be based upon more than mere conjecture, speculation or surmise. The evidence must rise above mere alternative possibilities, and the evidence upon which reliance is placed must rise to the dignity of suggesting and supporting a reasonable probability. *Gunning* v. *Cool-*

ey, 81 U.S. 90, 93, 50 S. Ct. 231, 233, 74 L. Ed. 720 (1930); *Galloway* v. *United States*, supra. See also *Commercial Standard Insurance Company* v. *Feaster*, 259 F.2d 210, 212 (10th Cir., 1958).

The Oregon and federal standards agree that the evidence which a plaintiff must produce at trial to support each material allegation and issue must be competent evidence. *Johnson* v. *Hoffman, et al*, 132 Or. 46, 59, 284 P. 567 (1930). Thus tenuous, conjectural, and speculative evidence cannot withstand a motion for a directed verdict or judgment n.o.v. *Galloway* v. *United States*, supra; *Moore* v. *Chesapeake & O. Ry*, supra.

Petitioner cites the Oregon case of *Fish* v. *Southern Pacific Company*, 173 Or. 294, 301, 143 P.2d 917, 920, 145 P.2d 991 (1944). This case (like dozens of other Oregon decisions) holds that the standard is whether there was "substantial evidence" to support the verdict. That remains the test in Oregon. See *Rossman* v. *Forman*, 224 Or. 610, 611, 356 P.2d 430 (1960). And that is the federal test too: *Ford Motor Company* v. *J. M. McDavid*, 259 F.2d 261, 266 (4th Cir., 1959); cert. den. 358 U.S. 908, 79 S. Ct. 234, 3 L. Ed. 2d 229 (1958): *Lovas* v. *General Motors Corp.*, 212 F.2d 805, 807 (6th Cir. 1954); *Reece et al* v. *Capital Transit Company*, 230 F.2d 824 (D.C. Cir., 1956). It was the test expressly applied in the present case by the District Court and adopted by the Court of Appeals. The Court of Appeals for the Ninth Circuit customarily applies the state standard of what

is "substantial evidence": *Union Pacific Railroad Co.* v. *Munoz*, 326 F.2d 248 (9th Cir., 1964). Indeed, to label the test a "Federal standard" is essentially superfluous, for there is no real disagreement between the state and federal courts in their application of this old and common principle.

This court correctly observed in *Galloway* v. *United States*, supra, that distinctions between the adjectives used in the general formulae (e.g. "substantial", "any," etc. evidence) do not aid legal understanding. Thus "whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard . . . cannot amount to a departure from the 'rules of common law' which the [Seventh] Amendment requires to be followed."

Because both Oregon and federal courts apply the test of "substantial evidence" to determine the granting of a directed verdict or judgment n.o.v., it is appropriate to define "substantial evidence." For our purposes, substantial evidence is simply sufficient evidence to support the allegations material to the plaintiff's claims for relief. See *Carlson* v. *Wheeler-Hallock Co.*, 171 Or. 349, 355, 137 P.2d 1001 (1943). This court has defined substantial evidence: "It means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Consoli-*

dated Edison Co. v. *National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1938). The Oregon federal district court and the Oregon state supreme court agree; see *Henzel et al* v. *Cameron et al*, 228 Or. 452, 464, 365 P.2d 498 (1961); *Johnson* v. *Flemming*, 188 F. Supp. 447, 449 (D. Or. 1960). "Substantial evidence" is simply evidence that is "reasonable, credible, and of solid value." *Union Pacific Railroad Company* v. *Munoz*, 326 F.2d 248, 250 (9th Cir., 1964). This legal phrase is a shorthand reference to the quantum of intelligent information upon which reasonable people could make reasonable decisions. It is the law's bulwark against sympathy, bias, whimsy, caprice and speculation.

In an attempt to eke out the claim that the District Court applied a standard more rigorous than the "Oregon" standard, despite the plain statement of the District Court to the contrary, Petitioner takes a statement of the District Court out of context. The Petitioner quotes District Judge Swigert, and implies that the quoted comments furnished a spurious standard for the granting of a judgment n.o.v. (Petition, p. 6). Even assuming that these quoted comments were more than mere grace notes, the fact is that they are proper and appropriate remarks directed to the granting of a *new trial*, to which the context of the District Court's opinion referred. Judge Swigert granted a new trial, and the Court of Appeals affirmed. The grounds for a new trial of course differ from those for a judgment n.o.v.: one proper ground for a new trial, of course, is the conviction of a trial

judge that a serious miscarriage of justice otherwise would occur.

We now turn to a brief inspection of the evidence, as it relates to the grounds asserted for the Petition. To avoid any subtleties or confusion, it is safe to introduce this factual discussion in clear terms:

1. The Oregon law requires "substantial evidence" to support a judgment of nonsuit, a directed verdict or a judgment *non obstante veredicto.*

2. The "Federal" rule on the right to a judgment n.o.v. is identical: "substantial evidence" again.

3. Judge Swigert of the District Court granted a judgment n.o.v. because (applying a strict paraphrase of the Oregon rule) of a lack of "substantial evidence" to support the verdict. Referring to the text of the opinion in the Petition, Appendix B, Judge Swigert refered to this standard on pages 21, 22, 23, 30, 37, 39, and elsewhere followed it by clear implication.

Petitioner's attack on Judge Swigert's comment that the verdict, if allowed to stand, would be "unfair . . . a miscarriage of justice" is misdirected. These comments related to Judge Swigert's order for a new trial in the alternative. They were a proper statement of grounds for a new trial. Petitioner wrongly implies that they were the grounds for the judgment n.o.v.

4. The Court of Appeals applied the same Federal-Oregon standard in its opinion: "A study of the

record convinces us that insufficiency of the evidence is such as to support judgment n.o.v. as well as new trial." (Petition, App. C, p. 62)

5. If the Courts below (or either of them, for that matter) applied the same, unified Oregon-Federal standard—a lack of "substantial evidence"—where is there any federal question? Where is there any basis for the reconciliation or settlement of a supposed conflict between Circuits as to whether a state or a federal standard should be applied? It would be an academic exercise to issue dicta on the subject here.

Although we now must examine the evidence briefly, there is no practical substitute for a reading of the Brief of the Appellee, Shell, in the Court of Appeals. The supporting technical data is set forth there in detail, and it would be inefficient to repeat it all here. We will discuss only the points raised in the Petition.

A preliminary remark: The Petition, and petitioner's whole case, rest inevitably upon the testimony of the two "experts," Dr. Marian and Dr. Traxler. On pages 7 and 8 of the Petition appears a list of the particular items which petitioner, in effect, claims to be "substantial" evidence to support the verdict. We will discuss items C, D, and E (Petition, p. 8), but any "substantial evidence" of liability upon Shell could have come only from the testimony of Marian and Traxler, for only they purported (at times) to testify that the Shell asphalt was defective.

i. Drs. Marian and Traxler.

Petitioner claims (Item A, Petition, p. 7) that Drs. Traxler and Marian "testified expressly that in their expert opinion the defendant's product was defective by reason of faulty chemical composition. The trial court concluded that these same experts found that the defendant's material was the best."

First, the trial court did not conclude that these experts found the defendant's material was the best. Petitioner's claim to the contrary is bogus. A reference to the remarks of the trial judge in the Petition, (Appendix B, p. 29) directly controverts the claim. What the trial court said was that the Doctors' testimony, to the effect that the Shell asphalt was of poor quality, failed to rise to the level of "substantial evidence" because of internal inconsistencies in their testimony. The petitioner has misstated the matter. The error is aggravated by petitioner's failure to read pages 29-30 of its own Petition.

Second, the testimony of these experts was utterly destroyed on cross-examination. Petitioner cannot claim that the testimony amounts to any more than its net, deflated effect; nor that its effect as "substantial evidence" amounts to any more than Marion's and Traxler's testimony taken as a whole, even indulging every favorable inference for Petitioner.

As Judge Swigert noted (Petition, App. B, pp. 30-32) Dr. Traxler's testimony completely disintegrated in one rather dramatic exchange, reported in pages 1483-1490 of the Transcript. Summarized, Dr. Traxler admitted on cross-examination:

a. According to his chemical analysis of the three types of asphalt that he tested (to make a comparison of properties), the Shell asphalt had the *best initial qualities* from the standpoint of adhesion (which was the issue of the case) (Tr. 1489-1490). This chemical analysis is the whole mainstay of Petitioner's case.

b. *However*, Dr. Traxler testified it was his opinion that despite its superior initial qualities, the Shell asphalt would deteriorate, and lose its adhesion, faster than the other asphalts, because of chemical changes. This is all that petitioner mentions (App. D, I, p. 67 of the Petition), concealing the barrage in which Dr. Traxler fled the field after a painful surrender.

c. It turned out that *the only reason* he claimed that this deterioration would occur was based on Traxler's inspection of the *outside* coating of a *single pipe* a day before he was cross-examined. He felt that *all* the Shell asphalt supplied to Beall was unstable because the outer coating of that *one pipe* was hardened. There were miles of pipes available for his inspection (Tr. 1488). The *inside* coating of that same pipe was perfect—and it was laid on at the same time, in the same dip, as the outside coat. When shown this —and he had not even looked at it before—he collapsed. It utterly defied his opinion; it proved conclusively that he was wrong.

d. Finally, as an honorable man, he admitted that he *did not know*—had no explanation, no opinion—

why the outside of that one pipe had become hardened. His whole testimony was exposed as a spurious guess, and he retreated to the concession that the Shell asphalt was originally the best of all he tested, and that he had no rational basis for his projection that Shell's asphalt must be more susceptible to aging and deterioration. He confessed that except for the condition of that outer coating of that one pipe he had no reason to suppose that Shell would not remain forever superior to the other asphalts. We well may wonder about, and a court may reject as inherently incredible, the testimony of a scientist, investigating phenomena relating to the inner lining of a pipe, who neglects to look there, but looks only at the outside of one pipe—which he concedes was probably damaged by soil conditions.

Is that "substantial evidence" of a defect in the Shell asphalt?

As for Dr. Marian, he too claimed that a chemical analysis (never used for this type of product by anyone else, and not even consistent with the procedures and controls established by its originator, one Roseler) showed the Shell asphalt to be unstable. He also claimed that the Shell asphalt showed "incipient" aging (deterioration) in laboratory performance tests. To support Marian's claims he introduced graphic data based on his chemical analyses. This evidence is digested and evaluated in Appellee's Brief, pp. 7-13. That evidence was so flimsy and specious, so riddled with intrinsic conflicts on the face of it that it could

not rise to the level of "substantial evidence." Marian was, among other things, purporting to run analyses (by his own admission) on asphalt samples that were so contaminated and deteriorated that they were "not even asphalt any more" (Tr. 2077, 2100). On the only tests in which he used authentic virgin asphalt, Shell was found to be greatly superior to the comparison product (Tr. 2131, 2141, 2142, 2146, 2147).

Is that substantial evidence of a defect in the Shell product?

ii. *Experimental test results (Item B, p. 7 and App. D, II, p. 68 of the Petition).*

This part of the Petition could have been written only by someone who never read the record. It is astounding. We (Shell) are accused of an untruth in claiming that Dr. Marian never produced an adhesion failure in 2½ years of testing the Shell asphalt. With considerable relish we cite the record: Transcript, p. 2152. If this does not specifically, directly and wholly support our version we are unable to read the language. Marian never managed to make a pipe coated with Shell asphalt fail, either (Tr. 1041).

It should also be noted that one of the things Marian was doing to the asphalt, in an attempt to make it lose its adhesion, was subjecting it to a "weatherometer" test—a form of torture testing under abusive simulated extreme exposure conditions (Tr. 1033).

All he ever got was some surface checking of the

asphalt (Traxler, Tr. 1434-1435). Marian conceded that he could not pry the asphalt off one of his test plates (undoubtedly the worst he could find) by any means—it was adhering solidly (Tr. 2087).

If it be recalled that these savants were attempting to explain a phenomenon—the detachment of asphalt in sheets from the insides of pipes—which in many cases occurred within several weeks, their testimony becomes patently incredible. Good adhesion after 2½ years of this hostile testing, on everything that was tried, simply gives the lie to their suppositions. There is an obvious explanation for the failures: All experts freely conceded that if petitioner failed to exercise proper temperature controls in pipe-dipping (and there was overwhelming evidence of that), exactly this sort of failure could be expected with the best of asphalts (Tr. 2151, 2097).

The basic significance of this failure of proof is that there was insufficient "substantial evidence" of any defect to support the verdict.

Petitioner seriously misconstrues the principle that actuated the District Judge below in granting a judgment n.o.v. According to petitioner, Judge Swigert acted on the basis of a disagreement with the jury on conflicting evidence. This is not so. The Judge clearly stated, several times, that the testimony of the witnesses, viewed most favorably for the plaintiff and disregarding conflicts for the defendant, failed to provide "substantial evidence"—the Oregon and Federal standard—of any negligence or defect in the

manufacture of the product. See Petition, App. B, pp. 22-23.

Other factual misapprehensions of the Petitioner should be noted:

iii. *Arithmetic revisited* (*Item C, Petition p.* 8)

As we read the record (Tr. 1879), Beall said it dipped about 6,200,000 feet of pipe in Witco asphalt between *1957* and 1963, of which 579,230 feet obviously lost its coating of asphalt, and another 330,000 feet (Beall's response was ambiguous) may have suffered the same problem. The Interrogatory referred to in this part of the Transcript asked for the footage dipped since *1959* (when Beall's pipe began to peel), and the claims for detachment since *1959.* Applying an average over that period produces the 20% figure. The tricky arithmetic was petitioner's idea, not ours. Petitioner supplied pipe production footage for an extra two years, which would improve petitioner's batting average, before Beall's dipping methods became so sloppy that the asphalt began to peel. Petitioner dipped about 100,000 feet of Witco pipe per month during the 1957-1959 period (favoring Beall, since the production is highly seasonal). The plant was out of production (fire) from June, 1961, to Spring, 1963. Therefore, from January 1, 1959, about 3,000,000 feet of Witco asphalt-coated pipe was dipped of which either 579,000 or 919,000 feet failed. Favoring Beall, using the former figure yields about a 20% failure ratio.

Why quibble? Simply because Beall says that the trial court made an erroneous "credibility judgment" of the testimony on this item—*and the only evidence on it came from Beall itself*. And the trial judge *believed it.*

iv. *Culvert pipe* (*Item D, p. 8 and Item IV, App. D, p. 75 of the Petition*).

Petitioner claims that the courts below disregarded the evidence of "plaintiff's lay witnesses and expert witnesses" to the effect that the defendant's material failed to adhere to *culvert* pipe as well as to smooth pipe. The retort to this is that there was no such evidence. We repeat: There was no such evidence. The only evidence was directly to the contrary, and it came from Beall's sales manager.

Indeed, the trial judge is almost slandered by this absurd assertion. What did Judge Swigert actually say about this? "As stated by Wilkins, Beall's sales Manager: 'It was satisfactory on culvert pipe, or at least I heard no claims.' (Tr. p. 457)" Petition, App. B, p. 26. That is exactly what Wilkins said, and it is the only evidence on culvert failures.

Where is there any evidence to the contrary, evidence that the asphalt failed on culvert pipe? The evidence, indeed, is that Beall continued to use Shell asphalt for culvert long after it stopped using it for smooth pipe—until fire destroyed their separate culvert dipping vat. (Exs. 110A, 318-351, 110A, 466-482, 110A, 113-153).

This matter was specifically inquired into orally by the Court of Appeals, and Petitioner could not give any accurate references to evidence of culvert failure. What petitioner did do on this subject was to make reference to various samples of asphalt taken from culvert pipes in service—but it will be noted that these references (Exs. 50-50f) omit, very significantly, any notation of "date of failure." There was not one single shred of testimony that anyone had observed a detachment of asphalt from culvert pipe in service.

Petitioner refers (Petition, p. 75) to "unequivocal testimony that there were culvert failures." This verges on irresponsibility, and it is an insult to the intelligence of this Court. Read, as petitioner requests, pages 54-55 of petitioner's opening brief to the Court of Appeals. A witness related a third-hand statement of a remark to the effect that the asphalt "didn't seem to be what it used to be; it was sticky." What evidence is this of *culvert failures? Of the loss of asphalt from culverts?*

v. *Witco pipe* (*Item E, p. 8 and Item V, App. D, p. 75 of the Petition*).

This claim is really haunting. It chastises Shell for having made an argument; it assumes that the argument was so seductive that it robbed both courts below of their discrimination; and it claims that in the argument we misrepresented the evidence. Petitioner is saved from being meretricious by being fey.

The Court of Appeals never mentioned the subject, which involved the direct testimony of a Witco man to the effect that a Beall executive said that Beall was not going to buy any more Witco asphalt because it was coming off the pipes. This conversation was shortly before Beall started using Shell asphalt. The evidence bore on the issues of warranty reliance, and on Beall's claim that Shell was warranted to be "as good as" Witco. (It was as good.)

What did we tell Judge Swigert in oral argument? "The evidence of Irving Berger was to the effect that he talked with Franklin Beall in September of 1959. Franklin Beall told him they weren't going to buy any more (Witco) because it was coming off the pipes, seven or eight of the last major orders that they had." (Tr. of Argument, December, 1964, p. 39). Petitioner claims that this mis-stated the evidence.

What did Berger testify? Tr. 1215-1216 makes petitioner's reproaches as surly as they are improper on the record: Berger testified that Beall said they were having an "adhesion problem," the asphalt was "falling off the pipe" on "the last seven out of the last eight major jobs" on which Beall was using Witco; and that Beall "presented me with a piece of coating which failed to adhere to one of their pipe jobs, and handed this to me."

And what did Judge Swigert say about this? He merely noted that there was strong evidence that Beall knew of Witco failures before Beall bought Shell asphalt, and that Beall denied this (Petition, App. B;

p. 46). No possible inference could be drawn that this remark of the District Court became a basis for the decisions below. The District Judge was clearly summarizing the evidence, and the Court of Appeals ignored this point.

The petitioner's references to pages 17, 28 and 38 of Appellee's Brief are equally silly. What was said there corresponds exactly to the evidence, supported by the references cited there, including petitioner's own sworn evidence.

B. There is no conflict between the decisions in this case below and the rules respecting burden of proof.

Petitioner asserts that the law relating to the "burden of proof" is identical to the law governing the sufficiency of the evidence to escape a judgment n.o.v. Petitioner cites no authority, and there must be none because no competent court would so aimlessly confuse two such different elements as evidence producing and motion making.

The element of "burden of proof" comprehends *who* must prove *what* to support his claim or defense. The element of "sufficiency of the evidence" is concerned only with *how much* of the appropriate evidence one must prove in order to avoid the malady of speculation which is cured by a judgment n.o.v.

The burden of proof is regulated by state law under *Erie*, because "what" is of course a substantive matter. The sufficiency of the evidence, the "how much" of the "what," is primarily a question ad-

dressed to the good sense of the trial court, which will refer to some adjective like "substantial." Federal courts and state courts—at least in Oregon, and in this case—follow the same principle and apparently employ the same mental process.

There was no forum shopping involved in this case. Petitioner's chosen forum (the District of Oregon) properly applied Oregon's substantive law and the federal court's procedural law. This application of the law was never challenged by petitioner below.

C. There is no conflict among the federal courts on the standards to apply in granting or denying a motion for a judgment n.o.v., based on the sufficiency of the evidence, applicable in this case.

The only issue upon which the petitioner can create jurisdiction in this Court is the specious contention that the federal courts in our case applied the wrong standard in determining that the plaintiff's proof was insufficient. The courts below did no such thing, as demonstrated above.

The spectre which petitioner raises before this Court, so that it will assume jurisdiction of this case, was never raised by petitioner below, in the district court or in the court of appeals. Now the petitioner asserts that a "state standard" should be applied, in contradistinction to an assumed different standard under federal law. However, this is a switch in assertions and tactics by petitioner; before the Court of Appeals below the petitioner urged the application of only "federal standards." The petitioner urged the

Court of Appeals for the Ninth Circuit to adopt the standards of the Court of Appeals for the Third Circuit, discussed in *Lind* v. *Schenley Industries Inc.*, 278 F.2d 79, 92 (3rd Cir., 1960), cert. den. 364 U.S. 935, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960). (See appellant's opening brief below, p. 14). And the *Lind* case makes no reference to applying a "state standard," makes no reference to any so-called distinction between state standards and federal standards. The petitioner also urged the Court of Appeals below to adopt a standard which had to be "federal," because it was applied in a federal criminal case, *Barnard* v. *United States*, 342 F.2d 309, 326 (9th Cir., 1965). See the actual test applied in *Barnard, supra*, 342 F.2d at 317. The only other authority cited by the petitioner to the Court of Appeals below was *Moist-Cold Refrigerator Co., Inc.* v. *Lou Johnson Co. Inc. et al*, 249 F.2d 246 (9th Cir., 1957), cert. den. 356 U.S. 968, 78 S. Ct. 1008, 2 L. Ed. 2d 1074 (1958), which applies the old faithful "substantial evidence" test. 249 F.2d at 256. (See appellant's opening brief below, p. 15.)

If one actually reads the cases cited by petitioner for its assertion that there is a conflict among the federal courts, the "conflict" evaporates. Petitioner asserts that the Sixth, Seventh and Eighth Circuits have held that the federal court must defer to state law in making the determination of what is the standard to be applied on a judgment n.o.v. motion, and petitioner asserts that the Fourth, Fifth, and Ninth Circuits have ruled to the contrary. In fact, the cases cited from the Sixth, Seventh and Eighth Circuits

simply hold that the state substantive law on what are the elements of the plaintiffs' respective cases must control in a diversity case, under *Erie*. The Fourth, Fifth, and Ninth Circuits do not disagree with that proposition. Cases from those circuits which adhere to that proposition are legion and need no citation of authority.

The cases cited by petitioner from the Fourth, Fifth, and Ninth Circuits simply state that a motion for a judgment notwithstanding the verdict raises the question of whether the evidence was sufficient, and that question is raised pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

In brief, the test (substantiality) is the same in state or federal courts, for the purposes of the instant case. The rights of the parties are exactly equivalent, but the procedural references may vary. A case from the 6th Circuit, one of petitioner's asserted "state standard" jurisdictions, demonstrates the point. In *Lovas* v. *General Motors Corp.*, 212 F.2d 805, 807 (6th Cir., 1954) the court held that sufficiency of evidence to take a case to the jury is a question of law for the trial judge, applying the state law under *Erie* for the substantive elements of *what* was to be proved. The court went on to say that in both state and federal law the principles to be applied in determining the necessary minimum sufficiency—the how much—of evidence are well settled: In both state and federal law there is a preliminary question for the judge whether there is any substantial evidence upon which a jury properly can proceed to find a verdict for the

plaintiff upon whom the burden of proof is imposed (by local law); evidence of no probative value is not enough to avoid granting a directed verdict; if the evidence on an issue is so overwhelming against the plaintiff's contention as to leave no room to doubt that a fact is not what the plaintiff claims it to be, and if such fact is essential to the plaintiff's cause of action, the court as a matter of law must direct a verdict for the defendant. The *Lovell* court cited, *inter alia*, the decisions of this Court in *Gunning* v. *Cooley*, 281 U.S. 90, 92-94, 50 S. Ct. 231, 74 L. Ed. 720 (1930) and *Moore* v. *Chesapeake & O. Ry. Co.*, 340 U.S. 573, 71 S. Ct. 428, 95 L. Ed. 547 (1951).

D. There is no uncertainty with respect to the Erie doctrine as applied to the instant case.

Petitioner is concerned over an asserted doubt in the scope of *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Texts, treatises, articles, cases, and discussions on the meaning and scope of *Erie* have cluttered the legal landscape, but fortunately those problems are not in view here.

Petitioner concedes that Rule 50 of the Federal Rules of Civil Procedure regulates the manner for moving for a judgment notwithstanding the verdict. That rule does not and need not express the standard for granting or denying such a motion. The standard applied by the Supreme Court of the state of Oregon is in no respect different from the standards, respectively, employed and described, and adopted, by the District Court and Court of Appeals in this case.

In our case the Oregon standards and all federal standards which have been collated are the same. Moreover, it is clear from the opinions of the courts below that the question of whose standards were to be applied was never considered, for it was never raised. Both courts below applied the same simple standard to determine whether there was probative evidence to displace mere speculation for the plaintiff-appellant-petitioner. There simply is no handle on petitioner's would-be "Federal question."

II

There is no conflict between the decisions below and the applicable law in determining whether to grant a motion for a new trial.

On this assertion petitioner does not even mention any authority. Petitioner asserted that there was a conflict among the federal courts concerning the standard to be applied on a motion for a judgment n.o.v. Petitioner cannot suggest a conflict among any federal courts on the standard to be applied in granting a new trial. Petitioner contents itself with asserting that in Oregon, under state practice and procedure, a trial court cannot weigh the evidence when determining whether to grant a motion for a new trial. Under Oregon statutory procedure a trial court certainly can grant a new trial when the evidence is insufficient to justify a verdict. O.R.S. 17.610(6).

It should be remembered that when this case was before the Court of Appeals petitioner urged that court to apply the standards of *Lind* v. *Schenley In-*

dustries, Inc., 278 F.2d 79, 90 (3rd Cir., 1960), cert. den. 364 U.S. 935, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960) and *Moist-Cold Refrigerator Co., Inc. v. Lou Johnson Co., Inc., et al*, 249 F.2d 246 (9th Cir., 1957), cert. den. 356 U.S. 968, 78 S. Ct. 1008, 2 L. Ed. 2d 1074 (1958). Both of those cases approve the federal district court's weighing of the evidence in determining whether to grant a motion for a new trial.

There is no doubt, in fact, that granting or denying new trials in the federal courts has been continuously and consistently equivalent to common law precedents and follows the practice of the federal, not state, courts. 6A *Moore's Federal Practice*, ¶59.04 [1], pp. 3711-3712. See also 6A *Moore's Federal Practice*, ¶59.08 [5], p. 3816, note 11.

Thus if a jury's verdict is against the overwhelming weight of the evidence, the federal court is required to weigh the evidence, under common law precedents and federal decisions. See *Magee* v. *General Motors Corp.*, 213 F.2d 899, 900 (3rd Cir., 1954). Petitioner asserts that the standard for determining the right to a new trial "falls within the ambit of substantive law." Petitioner cites no authority for this proposition, and there is none. Professor Moore disagrees with it:

> "The matter of new trial is closely related to the mode of trial; and has a definite impact upon the time for appeal. Many disruptive factors would be injected into federal judicial administration by making state law applicable to new trials in 'diversity' cases, and without any ap-

parent factors of merit to compensate for the disruption. *Erie-Tompkins* should be inapplicable and this principle has the support of the cases, although they do not much discuss the impact of *Erie.*" 6A *Moore's Federal Practice* ¶59.04 [1], p. 3712.

CONCLUSION

Petitioner realizes that there is no difference—in operation, statement, approach, philosophy or otherwise—between the sufficiency standard accepted by the state courts of Oregon and the standard applied by the Federal courts below to the evidence in this case.

Therefore, in order to manufacture a "Federal question" as a basis for another appellate review—in this Court—petitioner has, consciously or simply as a fugitive response to pressure, followed a devious path strewn with sophistries and without the guidance of legal authorities or factual accuracy.

Petitioner claims in this Court, for the first time, that the "Federal question" that this Court should resolve is a conflict between the various Circuits as to whether a state or a federal standard controls the quantum of evidence required for the giving or staying of a judgment n.o.v.

Petitioner must have observed at the outset that the courts below, in this case, applied the Oregon rule, which is also the federal rule. Petitioner also must have observed, if it looked, that there is no conflict

among the lower federal courts, among themselves, or with any of the procedural-substantive doctrines announced by this Court which are applicable to this case. This created a quandary for the petitioner. The quandary found its solution in, and explains, the truly lamentable scrabbling that petitioner has indulged in concerning the record of testimony and the actions of the courts below in this case.

What petitioner has attempted, in its Petition, is to inflate any colorable evidence in its favor so vastly as to create the impression that even though the courts below purported to follow the Oregon-Federal standard ("substantial evidence"), they actually did not view the quantum of evidence as generously as an Oregon state court would have done, but applied some secret Federal appraisal to it, and found it wanting. Presto, a federal question. But it isn't a federal question, or a legal question, at all. It is a question of fact —whether the evidence was "substantial," probative, credible. Petitioner's real claim is a mournful, nostalgic hope that the evidence should have been better than the courts factually found it to be. In the guise of a "federal question" the petitioner wants this Court to repeat a factual review which engrossed the courts below for over two years and left them convinced that petitioner proved no case on the facts.

And so, with a wave of the wand, the record was ignored and misinterpreted where it disagreed with petitioner. In order to elevate petitioner's raddled proof to the level of "substantial evidence," and to

defy the measured judgment of two courts and four experienced judges (who worked and studied and analyzed with tremendous care and scholarship for over two years), the petitioner lurched into the pitfall of misreading the record itself.

If the petitioner's right to a Writ of Certiorari depends on the success of petitioner's scheme here, and if the record, truly stated, exposes petitioner's effort, Certiorari should be denied. We stand on the record.

Respectfully submitted,

ARDEN E. SHENKER
801 Standard Plaza
Portland, Oregon 97204
Counsel for Petitioner

LAMAR TOOZE JR.
801 Standard Plaza
Portland, Oregon 97204
Of Counsel